No. 04-1690

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CALIFORNIA FEDERAL BANK, FSB

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record

STUART E. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

DAVID M. COHEN
JEANNE E. DAVIDSON
JOHN N. KANE, JR.
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, in a *Winstar*-related case, an exchange of documents between thrift regulators and a thrift institution that simply embodies a request for and grant of regulatory approval of a proposed acquisition by the thrift constitutes a contract between the United States and the thrift.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

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The Solicitor General, on behalf of the United States, respectfully conditionally cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. If the Court grants the petition in *California Federal Bank, FSB* v. *United States*, No. 04-1557, it should grant this cross-petition. If the Court denies that petition, it also should deny this cross-petition.

OPINIONS BELOW

The opinion of the court of appeals (04-1557 Pet. App. 1a-17a) regarding liability and other matters is reported at 245 F.3d 1342. The opinion of the court of appeals after remand proceedings on certain remedial issues (04-1557 Pet. App. 122a-143a) is reported at 395 F.3d 1263. The opinion of the Court of Federal Claims regarding liability (04-1557 Pet. App. 57a-121a) is reported at 39 Fed. Cl. 753. The initial opinion of the Court of Federal Claims regarding remedies (04-1557 Pet. App. 18a-56a) is reported at 43 Fed. Cl. 445. The opinion of the Court of Federal Claims on remand re-

garding remedies (04-1557 Pet. App. 144a-173a) is reported at 54 Fed. Cl. 704.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2005. The petition for a writ of certiorari in *California Federal Bank, FSB* v. *United States*, No. 04-1557, was placed on this Court's docket on May 20, 2005. This conditional cross-petition is filed pursuant to Rule 12.5 of the Rules of the Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of 12 U.S.C. 1464(a) (1982), 12 U.S.C. 1730(q)(1) and (6) (1982), and 12 U.S.C. 1730a(e)(1) are set forth in the Appendix to this petition. App., *infra*, 1a-3a.

STATEMENT

This case is one of approximately 39 *Winstar*-related cases (see *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996)) that were filed after the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 107-73, 103 Stat. 183, and that are still pending in the Court of Federal Claims and the Federal Circuit. This conditional cross-petition concerns the court of appeals' affirmance of the trial court's liability ruling on summary judgment that the United States and California Federal Bank (CalFed) had a contractual relationship with respect to two particular transactions, such that a breach of contract could arise from a change in the regulatory scheme brought about by FIRREA. The petition in No. 04-1557, filed by CalFed, concerns one of the court of appeals' rulings on remedial issues. That petition asks this Court to grant, vacate, and remand the deci-

sion below in light of a subsequent decision by the Federal Circuit, a course the United States opposes for reasons that will be explained in a brief in opposition to that petition. In the unlikely event this Court grants plenary review based on that petition, however, the United States believes that it would be appropriate to grant review of this cross-petition as well. The United States filed a substantially identical conditional cross-petition in response to an earlier petition in this case, and the Court denied review.

1. From the 1930's until after the events at issue in this case, federal regulation of the thrift industry was the primary responsibility of the Federal Home Loan Bank Board (FHLBB or Bank Board). See generally 12 U.S.C. 1464 (1982). "Congress delegated power to the Board expressly for the purpose of creating and regulating federal savings and loans so as to ensure that they would remain financially sound institutions able to supply financing for home construction and purchase." *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 168 (1982). The Federal Savings and Loan Insurance Corporation (FSLIC) administered a fund that insured deposits held by thrift institutions. 12 U.S.C. 1726 (1982). FSLIC was a separate entity under the direction of the FHLBB. See 12 U.S.C. 1725(a) (1982).

At the times pertinent to this case, Congress had by statute prohibited any insured thrift institution from acquiring or merging with another insured institution without regulatory approval. See 12 U.S.C. 1730(q)(1) (1982) ("No person * * * shall acquire control of any insured institution * * * unless [FSLIC] has been given sixty days' prior written notice * * * and within that time period [FSLIC] has not issued a notice disapproving the proposed acquisition."); 12 U.S.C. 1730a(e)(1)(A)(i) (1982) ("It shall be unlawful for * * *

any savings and loan holding company * * * to acquire, except with the prior written approval of [FSLIC], the control of an insured institution or a savings and loan holding company."). A notice to FSLIC of a proposed merger of a thrift had to include "[t]he terms and conditions of the proposed acquisition." 12 U.S.C. 1730(q)(6)(C) (1982); see 12 C.F.R. 563.22 (1982) (no thrift may increase its insurable accounts as part of any merger or consolidation without FSLIC's approval); 12 C.F.R. 571.5(b)(2) (1982) (similar information for savings and loan holding company). At all relevant times, the acquiring institution had to submit an application for approval of a merger, acquisition, consolidation, or change in control of a thrift. See, *e.g.*, 12 C.F.R. 546.2(c), 563.22(a), 584.4(f) (1982). The regulations prescribed that in ordinary merger situations, "[t]he proposed treatment of goodwill in connection with the merger must be fully described in the application," 12 C.F.R. 571.5(e) (1982), and potential merger applicants were "encouraged to review proposed mergers with the Supervisory Agent prior to proceeding with the formal application process," 12 C.F.R. 571.5(a) (1982).

2. CalFed made three sets of acquisitions in the 1980's. We do not challenge the court of appeals' ruling that the United States is liable for breach of contract with respect to one of CalFed's acquisitions, which involved four thrifts known collectively as "Southeast." That transaction involved more than mere regulatory approval. We do, however, dispute the court of appeals' rulings, on undisputed facts, that the United States entered into contracts with CalFed when the FHLBB and FSLIC took regulatory actions concerning CalFed's other two acquisitions—of Brentwood Savings and Loan Association and the Family Savings and Loan As-

sociation—and that those "contracts" could in turn give rise to liability for breach.

a. In February 1982, CalFed acquired the four Southeast thrift institutions. 04-1557 Pet. App. 20a & n.2. The acquisition resulted in an assumption by CalFed of $305 million in net liabilities. *Id.* at 3a, 20a. On February 3, 1982, the Bank Board passed a resolution approving the transactions and specifically reciting that "[t]he mergers are conditioned upon the execution of an Assistance Agreement between [CalFed] and the FSLIC." 2 C.A. App. A5000205.[1] On February 5, 1982, CalFed accordingly entered into an assistance agreement with FSLIC, under which it received a $9 million capital credit from FSLIC. The FHLBB issued a forbearance letter to CalFed permitting it to record an amount equal to the excess liabilities as goodwill and to amortize that amount over 35 to 40 years. The agreement between FSLIC and CalFed was a contract. It was entitled "Assistance Agreement," and it stated in its first sentence that it "is entered into between the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, an independent agency of the United States Government ('FSLIC'), and CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION." *Id.* at A5000223. After a series of recitals, the agreement stated that "[i]n consideration of the mutual promises herein contained, the parties enter into the following agreement." *Id.* at A5000224. The agreement included an integration clause, similar to the clauses in the contracts at issue in *Winstar*, see 518 U.S. at 862, 864, 867 (plurality opinion), that incorporated the

[1] All references to "C.A. App." refer to the joint appendix submitted to the court of appeals in connection with its liability decision reproduced at 04-1577 Pet. App. 1a-17a and reported at 245 F.3d 1342.

FHLBB forbearance letters that were issued contemporaneously with the assistance agreement. 2 C.A. App. A5000228.

The government does not dispute that the Southeast assistance agreement was a contract and, for purposes of this cross-petition, we do not dispute that the United States is liable for breach of that contract after enactment of FIRREA, which prohibited CalFed from using the goodwill to satisfy federal capital requirements for the entire 35-40 year period. CalFed's acquisition of the Southeast thrifts is therefore not at issue in this cross-petition. That transaction does, however, illustrate the steps necessary for a contract with the United States, steps which were not taken with respect to the transactions that are at issue in this cross-petition.

b. In October 1982, CalFed acquired the parent company of Brentwood Savings, a federally insured thrift institution in Los Angeles. There was no assistance agreement between FSLIC and CalFed in which FSLIC furnished guarantees or other financial assistance to CalFed in connection with its acquisition of Brentwood. CalFed negotiated a merger agreement with the owner of Brentwood. 2 C.A. App. A5000302-A5000339. On July 12, 1982, Brentwood submitted to the Bank Board a document entitled "Application of [CalFed] For Merger With Brentwood Savings" and asked that certain forbearances be granted in connection with the merger. *Id.* at A5000374. The application was submitted pursuant to 12 U.S.C. 1730a(e) (1982), which required FSLIC approval of an acquisition of an insured thrift by a savings and loan holding company. See 3 C.A. App. A5002319. In a letter dated July 27, 1982, CalFed set forth "the reasons for the supervisory forbearances requested" in connection with the proposed merger. *Id.* at A5000475. In a letter dated Sep-

tember 2, 1982, CalFed again requested approval for the transaction and asked to be able to record the net liabilities it assumed in the transaction (which amounted to $314 million) as supervisory goodwill to be amortized over 35 years. 04-1557 Pet. App. 4a; see 3 C.A. App. A5002325.

The FHLBB, as the operating head of FSLIC, approved the transaction in a resolution dated September 30, 1982. 3 C.A. App. A5002319-A5002321. The resolution begins with several "whereas" clauses, and continues that "IT IS HEREBY RESOLVED, that the subject acquisition of * * * Brentwood is hereby approved * * *, provided that the following conditions are complied with." *Id.* at A5002319. Among the conditions was that CalFed "shall furnish analyses * * * satisfactory to" FHLBB's agents

> which (a) specifically describe, as of the effective date, any intangible assets, including goodwill, or discounts and premiums arising from the merger to be recorded on the books of Applicant, and (b) substantiate the reasonableness of amounts attributed to intangible assets, including goodwill, and the discounts and premiums and the related amortization periods and methods.

Id. at A5002321.

In a letter to CalFed dated October 1, 1982, the FHLBB, in its own capacity and as operating head of FSLIC, stated that "[i]n its approval of the merger [of CalFed and Brentwood], the Bank Board determined to exercise supervisory forbearance, to grant waivers and to confirm the manner of application of certain regulatory requirements of the Bank Board and the FSLIC applicable to the Resulting Association." 3 C.A. App. A5002322. The letter went on to specify "the nature and extent of the confirmations, forbearances and waiv-

ers granted in recognition of the circumstances of the merger." *Ibid.* Among the forbearances was a statement that CalFed

> may amortize any goodwill created under the purchase method of accounting using the straight line method over the estimated useful life of 35 years * * *. Notwithstanding any change in generally accepted accounting principles or interpretation thereof, [CalFed] may report for any and all reports to the Federal Home Loan Bank Board its financial condition and operations in accordance with the accounting method described in the preceding sentences.

Id. at A5002323-A5002324.

c. In January 1983, CalFed acquired Family Savings and Loan Association, which had operated in Reno, Nevada. That transaction was preceded by negotiation of an acquisition agreement between CalFed and Family. 2 C.A. App. A5000490-A5000521. CalFed then applied for FHLBB approval of the merger. *Id.* at A5000531. CalFed's application included a copy of the acquisition agreement between CalFed and Family, which recited, *inter alia*, that any goodwill created by the merger (which in fact ultimately amounted to $17.74 million, 04-1557 Pet. App. 5a) would be amortized using the straight line method over a 40-year period. 2 C.A. App. A5000503. CalFed's application to the Bank Board stated that CalFed "requests that the FHLBB specifically approve the amortization of any goodwill created under the purchase method of accounting using the straight line method over the estimated useful life of 40 years." *Id.* at A5000536. CalFed also submitted a letter to the Bank Board requesting, *inter alia*, the same sort of forbearance it had requested in connection with

its acquisition of Brentwood. *Id.* at A5000484-A5000488.

As with CalFed's acquisition of Brentwood, there was no assistance agreement between FSLIC and CalFed in connection with CalFed's acquisition of Family. The FHLBB approved the transaction in two resolutions dated January 5, 1983. 2 C.A. App. A5000179-A5000180, A5000182-A5000189. The resolutions were in form quite similar to the resolutions in the Brentwood transaction. The first resolution granted CalFed a federal charter for the new Nevada institution that would result from the merger. *Id.* at A5000179. The second resolution approved CalFed's acquisition of control of Family, pursuant to 12 U.S.C. 1730a(e) (1982). *Id.* at A5000182. The FHLBB also sent a forbearance letter to CalFed in connection with the Family transaction on January 5, 1983, that was in relevant respects identical to the October 1, 1982, letter it sent in connection with the Brentwood transaction. 3 C.A. App. A5002559.[2]

3. In 1989, Congress enacted FIRREA, which overhauled the entire structure of federal thrift regulation. Of particular relevance here, it obligated thrifts to comply with strict new capital standards, which phased out over a five-year period the ability of thrifts to count goodwill as capital for federal regulatory purposes. See

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[2] The court of appeals erroneously stated that there was a forbearance letter dated November 26, 1982, in addition to the forbearance letter dated January 5, 1983. 04-1557 Pet. App. 5a. There was no such letter prior to January 5, 1983, since the Bank Board would not issue a forbearance letter prior to having approved the transaction. It appears that the court of appeals was referring to an internal Bank Board memorandum dated November 26, 1982, which analyzed the proposed acquisition, including the forbearances sought by CalFed. See 3 C.A. App. A5002612, A5002616.

generally *Winstar Corp.*, 518 U.S. at 856-857 (plurality opinion).

4. CalFed brought suit against the government in the Court of Federal Claims, asserting that FIRREA's prohibition on the use of goodwill to satisfy the new capital requirements breached contracts it allegedly entered into with the government in connection with its acquisitions of Southeast, Brentwood, and Family. After this Court's decision in *Winstar*, then-Chief Judge Smith of the Court of Federal Claims adopted a plan to resolve common issues in the more than 120 *Winstar*-related cases then pending in that court. 04-1557 Pet. App. 3a. The plan ultimately included a process by which the court first addressed summary judgment motions on liability in this case and three other cases. The four cases were selected because they "raise issues that are potentially relevant in a large number of the pending *Winstar*-related cases," *id.* at 63a, and "would ventilate the broadest cross-section of the contract defenses raised by defendant," *id.* at 67a.

In this case, the government argued in opposition to CalFed's summary judgment motion with respect to its acquisitions of Brentwood and Family that, *inter alia*, "no 'Winstar-like contractual obligations' were imposed on the government." 04-1557 Pet. App. 105a. The government reasoned that the relevant documents consisted only of requests by a regulated entity for the necessary regulatory approval of its acquisitions of another entity, followed by grants by the government authorities of that approval, subject to certain conditions. Those regulatory approvals, the government argued, do not constitute a contractual undertaking by the government. The Court of Federal Claims, however, framed the issue as whether:

> Absence of a written Assistance Agreement *per se* eliminates any possibility that an acquiring thrift and the government executed a capital contract, because without such an assistance agreement, the FHLBB/FSLIC resolutions, letters and other documents and evidence cannot be given contractual effect.

Id. at 103a.

Having framed the claim as stated above, the trial court rejected it. It agreed with CalFed's contention that "[t]he common operative fact in all *Winstar*-type transactions is that 'the Government sought to induce the acquisition of a troubled thrift through promises regarding supervisory goodwill and capital compliance and was successful.'" 04-1557 Pet. App. 104a. The court stated that, "[i]f the factual records of individual cases show intent to contract with the government for specified treatment of goodwill, and documents such as correspondence, memoranda, and Bank Board resolutions confirm that intent, the absence of an [assistance agreement] or [supervisory action agreement] should be irrelevant to the finding that a contract existed." *Id.* at 105a. The court then concluded "that contracts existed between CalFed and the government" with respect to CalFed's acquisitions of Brentwood and Family and granted summary judgment on liability to CalFed. *Id.* at 107a. The court explained, moreover, that it found an express contract between CalFed and the government in this case. *Id.* at 106a-107a. The court did not, however, specify which of the documents reflecting regulatory approval by the FHLBB and FSLIC constituted that express contract. Nor did it identify the basis on which it concluded, on a motion for summary judgment, that there was an intent to contract in this case. Rather, the court stated simply that

"[m]utuality of intent, even in the context of written contracts, may be established by several contractual instruments as opposed to one superseding document," and that "[c]ontracts are frequently found to exist despite the absence of an integrating document." *Id.* at 106a.

5. The case was then transferred to Judge Hodges for resolution of damages issues. Judge Hodges held that CalFed had failed to prove many elements of its claimed billions of dollars in damages, but he ultimately awarded CalFed approximately $23 million in compensation for costs it incurred in replacing the goodwill the continued use of which to satisfy regulatory capital requirements was eliminated by FIRREA. One of the damages issue in this case is the subject of the petition in No. 04-1557. This cross-petition, however, concerns the liability issue that had already been decided on summary judgment by Chief Judge Smith.

6. The government appealed the liability ruling, and CalFed appealed the damages ruling to the Federal Circuit. The court of appeals affirmed the trial court's determination on summary judgment that the United States had entered into a contract with CalFed. 04-1557 Pet. App. 6a-10a. Initially, the court agreed with the trial court that "[t]he fact that Cal Fed did not enter into an assistance agreement by which it would receive direct cash assistance from the FSLIC in the Brentwood and Family transactions * * * is not dispositive of the issue of contract formation between the government and Cal Fed." *Id.* at 7a. The court stated that "the government bargained with Cal Fed to assume the net liabilities of the acquired thrifts in exchange for favorable regulatory consideration allowing goodwill to be counted as an asset." *Ibid.* The court also concluded that "both the government and Cal Fed

provided consideration for the agreements," which included the government's commitments regarding CalFed's use of goodwill. *Id.* at 8a. The court concluded, "[b]ased on all of the contemporaneous documents in each of the * * * transactions," *ibid.*, that "[j]ust as in [this Court's decision in *Winstar*], all of the necessary elements of contract formation are present here, and the parties are bound by the terms of that contract." *Id.* at 9a. Like the trial court, however, the court did not identify any evidence that supported the conclusion that CalFed and the United States intended to form a contract, rather than to seek and grant, respectively, the necessary regulatory approval for CalFed's acquisitions of Brentwood and Family.

With respect to damages issues, the court of appeals affirmed the trial court's rulings, with one exception. The court vacated the trial court's ruling that CalFed's proof of lost profits damages was insufficient as a matter of law, holding that the evidence was sufficient "to create a genuine issue of material fact as to the existence and quantum of lost profits." 04-1557 Pet. App. 13a. The court therefore remanded the case to the trial court for further proceedings with respect to that issue. *Id.* at 17a.

7. On remand, the trial court again rejected CalFed's lost profits claim after a six-week trial, finding that CalFed "did not prove causation, foreseeability, or reasonable certainty of damages at trial," and that CalFed in fact "improved its tangible capital position because it phased out supervisory goodwill." See 04-1557 Pet. App. 145a; see *id.* at 144a-173a.

8. Both parties again appealed. On CalFed's appeal, the Federal Circuit affirmed the trial court's ruling, on remand, leaving in place the award of $23 million in costs for replacement of supervisory goodwill. 04-1577

Pet. App. 126a-139a. The government renewed its appeal of the liability ruling with respect to the Brentwood and Family transactions on the ground that no contract had been formed, albeit expressly recognizing that "[t]o the extent the law of the case doctrine prevents a re-examination" of the Federal Circuit's previous ruling on that subject, "the issue will have to await any Supreme Court review." *Id.* at 140a. On the basis of "law-of-the- case principles," the court of appeals rejected the government's liability argument. *Ibid.* The court also rejected an additional liability argument, not at issue on this cross-petition, that intervening Federal Circuit precedent had established that FHLBB and FSLIC representatives were unauthorized to enter into the contract that was allegedly formed in this case. *Id.* at 140a-142a.

ARGUMENT

This Court should deny the petition in No. 04-1557 for the reasons the government will detail in a brief in opposition to be filed with the Court. Four years ago, the government filed a conditional cross-petition to CalFed's earlier petition for certiorari, which presented, *inter alia*, the same issue presented in CalFed's current petition. The Court denied CalFed's petition and therefore had no occasion separately to consider the government's cross-petition. The government hereby renews its cross-petition, essentially for the same reasons that supported it last time. Accordingly, if the Court grants the petition in No. 04-1557, it should also grant this cross-petition.

The damages issue raised in CalFed's petition is premised on the proposition that the government entered into a contractual relationship with CalFed, such that a subsequent breach should lead to an award of damages. This cross-petition challenges that funda-

mental premise. The actions by the FHLBB and FSLIC at issue in this cross-petition involved no *contractual* commitments by the government that could form the basis for any claim for contract damages, but instead involved instances in which CalFed merely applied for and obtained the necessary *regulatory* approval to engage in regulated transactions. If the Court decides that the factbound damages issues raised by petitioner warrant its consideration, it should also consider the antecedent liability issue raised herein, which presents a legal issue that could have far greater significance for the remaining *Winstar*-related cases.

The court of appeals' decision is an extraordinary extension of contract law principles to federal regulatory action. In the cases before this Court in *Winstar*, the existence of contracts with the government was undisputed, based on the existence of assistance agreements between FSLIC and the acquiring thrift, pursuant to express statutory authority. The Court construed those contracts to contain a guarantee by FSLIC against loss by the acquiring thrift resulting from a change in the law governing the use of goodwill to satisfy federal capital requirements. The record in this case, by contrast, consists of materials documenting only the regulatory approval of private transactions, accompanied by statements of regulatory forbearance. Those documents do not constitute a contract at all. In affirming the Court of Federal Claims' grant of summary judgment to CalFed on the question of liability, the court of appeals held, as a matter of law, that a request for and grant of regulatory approval for a transaction constituted a contract binding on the United States and remediable in damages. That conclusion flies in the face of settled principles of administrative law, under which the mere exercise of governmental

regulatory authority does not create a contractual relationship between the government and regulated entities.

1. "Banking is one of the longest regulated and most closely supervised of public callings." *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947). Savings and loan associations were "created, insured and aided by the Federal Government." *Ibid.* At the time CalFed acquired Brentwood and Family, no insured savings and loan association could conclude a merger without the regulatory approval of FSLIC. 12 U.S.C. 1730(q), 1730a(e) (1982).

Each of the merger and acquisition transactions at issue on this cross-petition involved CalFed's seeking—and the Bank Board's granting—the necessary regulatory approval. With respect to each of the transactions, CalFed submitted an application seeking the Board's approval. 2 C.A. App. A5000374-A5000455, (Brentwood), A5000531-A5000743 (Family). As the then-current regulations required, see 12 C.F.R. 571.5(b)(2), 571.5(e) (1982), CalFed included in each application a description of the accounting methods it anticipated it would use to account for the merger, and it included a list of the regulatory forbearances that it desired the Bank Board to grant. 2 C.A. App. A5000382, A5000454-A5000455 (Brentwood), A5000536 (Family). CalFed sent the Bank Board two letters in connection with the Brentwood acquisition and one letter in connection with the Family acquisition concerning the requested forbearances. *Id.* at A5000475-A5000480 (Brentwood); 3 C.A. App. A5002325 (Brentwood); 2 C.A. App. A5000484-A5000488 (Family). The Bank Board adopted resolutions approving each merger or acquisition, 3 C.A. App. 5002319-A5002321, A5000461-A5000463 (Brentwood merger); 2 C.A. App. A5000179-

A5000180, A5000182-A5000188 (Family acquisition), and issued letters setting forth the forbearances CalFed sought, *id.* at A5000465-A5000467 (Brentwood); 3 C.A. App. A5002559-A5002561 (Family).

All of the documents in both of the transactions manifest a straightforward exercise of federal regulatory authority, in which the regulated entity explains how a transaction it seeks will serve the public interest and satisfy specific statutory and regulatory standards, and the federal regulator decides to approve the transaction on that basis. There is no document with respect to either of the transactions that remotely suggests that a contractual commitment—as opposed to a regulatory approval—by the government was at issue. The Bank Board resolutions, for example, recited simply that the mergers by petitioner were "approved." See, *e.g.*, 3 C.A. App. A5002321 (Brentwood); 2 C.A. App. A5000179-A5000183 (Family). Similarly, the forbearance letters stated that the Bank Board had "determined to exercise supervisory forbearance" and set forth "the nature and extent" of the forbearances granted. See 3 C.A. App. A5002322 (Brentwood), A5002559 (Family). All of those documents, by their terms, are framed in terms of determinations to exercise (or, in the case of forbearances, determinations not to exercise) regulatory authority. None of the documents suggests an exchange of contractual commitments.[3]

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[3] One former Bank Board employee gave CalFed a declaration in connection with this litigation in which he stated that "[a]n acquiring institution, such as CalFed, would have had the same level of assurance as to the treatment of goodwill between assisted and unassisted transaction"—*i.e.*, transactions in which the government made payments and entered into express contracts (as in *Winstar*) and transactions in which it did not (as in this case). 3 C.A. App. A5002914 (declaration of D. James Croft). Both the de-

Certainly, the fact that the regulatory approvals here were preceeded by an application filed by CalFed and one or two subsequent letters attempting to secure the regulators' approval does not suggest that the parties engaged in contractual "negotiations" or that the resulting documents—contrary to their terms—embodied contractual commitments. Such "negotiations" between regulator and regulated entity are an accepted part of ordinary agency practice. Cf. *USA Group Loan Servs., Inc.* v. *Riley*, 82 F.3d 708, 714-715 (7th Cir. 1996) (discussing Negotiated Rulemaking Act of 1990, 5 U.S.C. 561 *et seq.*). Moreover, there was no documentary evidence that the federal regulators played any role whatever in the only genuinely contractual negotiations that did occur—those between CalFed and the owners of the institutions it acquired.[4]

Nor was there anything "contractual" about the Bank Board's decision to forbear from enforcing particular regulatory requirements. To the contrary, such forbearances are an exercise of the enforcement discretion

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tails and the conclusion of that declaration were substantially disputed by the government. See, *e.g.*, *id.* at A5001450-A5001451 (declaration of Lawrence Hayes, former FHLBB General Counsel). The declaration accordingly could not have been (and was not) relied upon by either court below in granting and affirming summary judgment to CalFed on liability.

[4] The record before the trial court included a single declaration by a CalFed attorney asserting that the federal regulators had induced CalFed to acquire Family. See 04-1577 Pet. App. 92a-93a (discussing affidavit of William Callender in connection with another issue). That evidence could not have furnished a basis for granting summary judgment in this case, because it was contradicted by the government's evidence that CalFed was independently interested in acquiring Family. See 3 C.A. App. A5001500 (internal CalFed document stating that Family was showing "good progress"), A5000861-A5000863 (company's interest in "extension of operations into new market areas").

vested in federal regulatory agencies, informing regulated entities that the regulators have no present intention to take action against them on the specified grounds. The legitimate grounds for declining to enforce regulatory requirements are so varied, and the discretion to weigh those grounds is so central to an agency's proper discharge of its regulatory responsibilities, that agency decisions to forbear from enforcing regulatory requirements are presumptively beyond the scope of judicial review. See, *e.g.*, *Heckler* v. *Chaney*, 470 U.S. 821 (1985). A fortiori, an agency's exercise of enforcement discretion does not suggest that the agency has entered into a binding contractual undertaking.

2. A comparison between *Winstar* and this case vividly illustrates the differences between the undoubted contracts in the *Winstar* cases and the absence of a contract here. The court of appeals stated that this case is like *Winstar* because, "[j]ust as in *Winstar* * * *, all of the necessary elements of contract formation are present here, and the parties are bound by the terms of that contract." 04-1557 Pet. App. 9a. In each of the transactions before the Court in *Winstar*, however, FSLIC and a thrift institution had formally signed a document entitled "Assistance Agreement" or "Supervisory Action Agreement." See 518 U.S. at 861-868. Those documents thus identified themselves as "agreements," and they included standard contractual clauses, such as integration clauses. See *ibid.* The issue before the Court in *Winstar* was not whether contracts had been formed, but whether the contracts that undoubtedly existed contained terms regarding the treatment of goodwill that gave rise to liability on the part of the United States when Congress passed a law that affected that treatment. Far from including all of the

necessary elements of contract formation present in *Winstar*, the Brentwood and Family acquisitions do not feature the most elemental aspect of contract formation—evidence of a mutual intent to contract. See *Lewis* v. *United States*, 70 F.3d 597, 600 (Fed. Cir. 1995) ("Like an express contract, an implied-in-fact contract requires (1) mutuality of intent to contract; (2) consideration; and, (3) lack of ambiguity in offer and acceptance" and (4) "actual authority to bind the government.").

The Court did address questions of contract interpretation in *Winstar*, ruling that the contracts there included commitments regarding the treatment of goodwill, as stated in Bank Board documents. But that conclusion was not based on the implausible assumption that the Bank Board documents themselves, contrary to their express terms, were inherently contractual in nature. Rather, the plurality concluded that the contracts that plainly existed between FSLIC and the acquiring thrifts—the assistance agreements—in turn incorporated and "characterize[d] the Board's resolutions and letters not as statements of background rules, but as part of the 'agreements and understandings' between the parties"—*i.e.*, between FSLIC and the acquiring thrifts. 518 U.S. at 863 (Glendale contract); see *id.* at 862 (noting that the terms of the Glendale contract were "similar in all relevant respects to the analogous provisions in the" other two transactions before the Court in Winstar). That reasoning does not suggest that Bank Board regulatory approvals were contractual in nature; it suggests to the contrary that a separate contract between FSLIC and the acquiring thrifts, which incorporated by reference the Bank Board resolutions, gave those resolutions a significance in addition

to their status as regulatory documents. No such contract exists in this case.

That conclusion is buttressed by the *Winstar* plurality's conclusions regarding the terms of the promise made by the government in that case. The plurality construed the promise not as one that "purported to bind Congress to ossify the law in conformity to the contracts," 518 U.S. at 871; see *id.* at 868-869, 881, 888, but as a contractual undertaking on the part of the United States to "assume[] the risk that subsequent changes in the law" would occur and to guarantee against losses the acquiring thrifts might incur as a result of any such change, *id.* at 871; see also *id.* at 868-869, 881-883, 888-890, 907-908, 909-910; *id.* at 911, 918 (Breyer, J., concurring); cf. *id.* at 919-920, 923 (Scalia, J., concurring in the judgment). Thus, the relevant contractual undertaking stemmed not from the regulatory approvals and forbearances themselves, on the theory that they contained an implied promise not to alter governing laws and enforcement discretion, but rather from the distinct actions by the government in entering into the FSLIC assistance agreements, which incorporated and thereby "contractualized" the otherwise regulatory approvals and forbearances.

Indeed, the plurality twice cited 12 U.S.C. 1729(f)(2)(A)(iii) (1982), which granted FSLIC authority to "guarantee" an acquiring thrift against loss resulting from its acquisition of a failing insured thrift. See 518 U.S. at 883, 890. At the time of the transactions in *Winstar* and this case, however, 12 U.S.C. 1729(f) (1982) provided that no such guarantee or other financial assistance could be provided by FSLIC in connection with such an acquisition in excess of the amount FSLIC determined to be reasonably necessary to save the cost of liquidating the failing insured institution.

See 12 U.S.C. 1729(f)(4) (1982). That requirement ensured that FSLIC would specifically consider the appropriateness of entering into a contractual commitment, in addition to giving regulatory approval, to facilitate the acquisition of a failing thrift.

In *Winstar*, the FHLBB (acting in its capacity as the head of the FSLIC) expressly made the required determination under 12 U.S.C. 1729(f)(4) (1982) in approving the assistance agreement between FSLIC and the acquiring thrift in connection with each of the acquisitions at issue. See 95-865 J.A. 81, 455-456, 608. The FHLBB likewise made that determination in approving the assistance agreement in connection with CalFed's acquisition of Southeast. See 2 C.A. App. A5000207. No such determination was made for CalFed's acquisitions of Brentwood and Family—for the simple reason that FSLIC provided no guarantee or other financial assistance to CalFed in connection with its acquisition of those thrifts. These starkly different modes of proceeding confirm that, unlike in *Winstar*, FSLIC did not enter into a guarantee contract in this case.

In short, what is missing in this case is any basis comporable to that in *Winstar* for concluding that the government and CalFed intended to (and did) give the Bank Board's regulatory approvals of the transactions and the accompanying regulatory treatment of goodwill a status beyond their manifest character as exercises of regulatory authority, by making, in addition, contractual commitments with respect to them. A court cannot properly find the existence of a contract—especially an "express" one, see 04-1557 Pet. App. 106a & n.21—between the United States and a private party based on the issuance of documents by a federal agency that constitute mere *regulatory* approval of a private trans-

action. To find a contract on the basis of actions by a federal agency in executing a regulatory law would not only violate ordinary principles of contract formation and administrative law, but would also violate the prohibition under the Tucker Act against recognizing contracts implied in law. See *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980) (per curiam); *United States* v. *Algoma Lumber Co.*, 305 U.S. 415, 418 (1939).

The courts below erroneously framed the government's contention to be that "the absence of an assistance agreement incorporating the forbearance letters precludes a finding that a contract existed in the Brentwood and Family transactions." 04-1557 Pet. App. 6a-7a; see *id.* at 103a ("Absence of a written Assistance Agreement per se eliminates any possibility that" there was a contract.). Of course, contrary to the court of appeals' view that the existence of such an agreement is "irrelevant" (see *id.* at 7a), the absence of such an assistance agreement powerfully supports the conclusion that the actions by the FHLBB and FSLIC in approving CalFed's acquisitions of Brentwood and Family were not contracts and should at least have precluded a grant of summary judgment against the government. Moreover, the presence of express agreements in *Winstar* and in the Southeast transactions and the exceptional nature of those agreements suggest that it would be remarkable for a regulatory agency to make similar undertakings in an oral or implicit contract.

But even if it is assumed, arguendo, that a contract could permissibly be found in these circumstances—despite, *e.g.*, the absence of any determination by FSLIC pursuant to 12 U.S.C. 1729(f)(4) (1982), concerning the extent of and need for a guarantee or other financial assistance—the even more fundamental point

is not that an Assistance Agreement was absent from the record for these transactions, but that there was nothing *present* in the record that would permit (much less compel) the conclusion that there *were* contracts. In a situation in which regulatory approval is required for a private entity to engage in a transaction, a determination by a court that the government has entered into a contract must be based on something more than a record of regulatory approval. There must be a manifestation of an intent to enter into a contract embodied in documents or conduct aside from the documents that record the agency's approval and the mere give-and-take of the regulatory process.[5]

3. The court of appeals' conclusion that a simple regulatory approval of a regulated entity's transaction may be construed to create a contract between the government and the regulated entity conflicts with long-standing principles of administrative law. "Congress delegated power to the [Bank] Board expressly for the purpose of creating and regulating federal savings and loans so as to ensure that they would remain financially sound institutions able to supply financing for home construction and purchase." *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 168 (1982). The

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[5] The Fourth Circuit in *Charter Federal Savings Bank* v. *Office of Thrift Supervision*, 976 F.2d 203 (1992), cert. denied, 507 U.S. 1004 (1993), also addressed a *Winstar*-related case in which the documents, like those here, were entirely consistent with a regulatory approval and manifested no intent to form a contract. The court noted that "no express, written contract exist[ed] between the parties," *id.* at 210-211, and that in that respect the case "differ[ed] from similar supervisory goodwill cases, which have all involved written agreements between the complaining thrift and the FHLBB or FSLIC." *Id.* at 211. The court concluded that for that reason it was "reluctant to rule that a contract exists," *ibid.*, but it ultimately decided the case on other grounds.

Bank Board was charged with making federal policies to govern the thrift industry and to exercise its delegated authority in service of those policies. The regulated entities, however, had no assurance that those policies would remain unchanged in the future or that they would not be subject to new or different requirements as the regulatory scheme unfolded.

Nor did the regulated entities have any expectation that the government would bear the costs if new or different regulations were adopted that increased their costs. To the contrary, although the Bank Board's actions were of course subject to the constraints imposed by its own organic statute and the Administrative Procedure Act, see, *e.g.*, *Getty* v. *FSLIC*, 805 F.2d 1050 (D.C. Cir. 1986) (unsuccessful bidder to acquire troubled thrift successfully challenged award under the APA), those sources of authority plainly allowed for changes in Board policies and the broader regulatory environment. "An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt its rules and policies to the demands of changing circumstances." *Rust* v. *Sullivan*, 500 U.S. 173, 186-187 (1991)) (internal quotation marks, brackets, and citations omitted); see *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 862 (1984). That is especially so in the context of banking, in which regulatory agencies and Congress might be required to revise existing laws and policies to protect the banking system and the public.

Under the court of appeals' holding, however, the Bank Board's exercise of delegated regulatory authority committed the United States to a contractual obligation to make regulated entities financially whole when a

change in the regulatory regime ensued. As this Court explained in addressing an analogous situation in *National Railroad Passenger Corp.* v. *Atchison, Topeka, & Santa Fe Railway*, 470 U.S. 451, 466-467 (1985), "absent 'an adequate expression of an actual intent' of the State to bind itself, this Court simply will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party" (citation omitted). *National Railroad Passenger Corp.* involved a claim that a statute, rather than a regulatory action, constituted a contract between the government and private entities. But the underlying rule in both instances is that "the principal function of a legislature [or regulatory agency] is not to make contracts, but to make laws that establish the policy of the state." *Id.* at 466. "Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws [or regulatory actions] as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative [or administrative] body." *Ibid.*

The rationale of *National Railroad Passenger Corp.*, the continued authority of which was in no way questioned by this Court in *Winstar*, is rooted in fundamental principles that distinguish between the action of the government as lawmaker and the action of the government as a contracting entity. See *Wisconsin & Michigan Ry.* v. *Powers*, 191 U.S. 379, 387 (1903) (announcement of government policy in a statute "simply indicates a course of conduct to be pursued until circumstances or its views of policy change"). The court of appeals' holding that the Bank Board's regulatory approvals of the Brentwood and Family transactions were contractual commitments by the government—where

there was no "adequate expression of an actual intent" of the government to bind itself by contract, 470 U.S. at 466—violated that bedrock principle. To imply a contractual undertaking from a regulatory approval is impermissible, because in this case, as in *National Railroad Passenger Corp.*, "[t]he continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation." *Keefe* v. *Clark*, 322 U.S. 393, 397 (1944) (quoting *Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837)).

4. The Federal Circuit in *Fifth Third Bank* v. *United States*, 402 F.3d 1221 (2005), has recently reaffirmed its decision in this case, see *id.* at 1229, holding that a series of communications that evidence nothing more than an application for, and grant of, regulatory approval for a thrift transaction was sufficient to establish that the regulator and the acquiring thrift formed a contract. In *Fifth Third*, the trial court ruled at the close of the plaintiffs' case that a mere regulatory approval—not a contractual commitment—was all that such an exchange of communications showed. The Federal Circuit reversed that factual finding and entered judgment for the plaintiffs, relying on the context of the savings-and-loan crisis of the 1980s, *id.* at 1231-1234, and after-the-effect testimony by officers of the thrift and the former thrift officials that they intended to enter into a contract, *id.* at 1235.[6]

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[6] In earlier cases, the Federal Circuit had appeared to adopt a more limited view of its liability ruling in this case. See *D&N Bank* v. *United States*, 331 F.3d 1374, 1378, 1381 (Fed. Cir. 2003) (holding that "mere approval of the merger does not amount to intent to contract" and "something more is necessary," and distinguishing this case); *Anderson* v. *United States*, 344 F.3d 1343, 1356 (Fed. Cir. 2003) (denying government liability where plaintiff

The court of appeals' determination that the federal regulatory approvals of CalFed's acquisitions of Brentwood and Family not only may but *must* be construed as government contracts is of potentially broad significance.[7] Its most immediate effect is on approximately 14 of the 39 still-pending *Winstar*-related cases that present a similar issue.

More generally, the court of appeals' holding threatens, in some undefined category of cases, to replace ordinary review of agency action under the Administra-

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failed to show "something more" beyond documentation demonstrating the government acting in its regulatory capacity). The court's *Fifth Third* decision makes clear that the Federal Circuit adheres to its view in this case that, at least in the *Winstar* context, a contract may be found on the basis of regulatory approval of a transaction.

[7] Before its decision in this case, the Federal Circuit and its predecessor had recognized the need to find evidence of contractual intent before finding that standard regulatory actions were actual contractual undertakings. See, *e.g.*, *Cienega Gardens* v. *United States*, 162 F.3d 1123, 1136 (Fed. Cir. 1998), cert. denied, 528 U.S. 820 (1999) (distinguishing *Winstar* and rejecting claim by owners of housing units that Department of Housing and Urban Development had contracted with them, on the ground that "[t]he plaintiffs in *Winstar* had contracts with integration clauses that expressly incorporated contemporaneous documents that allowed them to use supervisory goodwill," while plaintiff owners of housing units "can point to no similar contractual provisions"); *New Era Constr.* v. *United States*, 890 F. 2d 1152, 1155 (Fed. Cir. 1989) ("[T]he government's involvement in the financing and supervision of a contract between a [state] agency and a private contractor does not create a contract between the government and the contractor."); *Aetna Cas. & Sur. Co.* v. *United States*, 655 F.2d 1047, 1052 (Ct. Cl. 1981) ("[W]here the United States does not make itself a party to the contracts which implement important national policies, no express or implied contracts result between the United States and those who will ultimately perform the work."); *D.R. Smalley & Sons, Inc.* v. *United States*, 372 F.2d 505, 507 (Ct. Cl.), cert. denied, 389 U.S. 835 (1967).

tive Procedure Act with entirely different standards applicable to contractual commitments. It also threatens to convert regulatory agencies into insurers against statutory changes and replace the ordinary remedy of setting aside agency action or remanding in instances of unlawful agency action with an entirely new remedy of contract damages. In an action under the APA, the court may "compel agency action unlawfully withheld or unreasonably delayed" or "hold unlawful and set aside agency action" that fails to satisfy the APA's standards. 5 U.S.C. 706(1) and (2). Money damages are not available. 5 U.S.C. 702 (a suit "seeking relief *other than money damages* * * * shall not be dismissed nor relief therein be denied on the ground that it is against the United States") (emphasis added). Similarly, the Federal Tort Claims Act bars "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute be valid." 28 U.S.C. 2860(a).

The APA's preclusion of money damages reflects the fundamental difference between the government's actions as regulator and its actions as a contracting party. The decision below blurs—indeed obliterates—that line by dismissing the absence of an agreement reflecting a distinct contractual undertaking as insignificant. If the Court grants review of the damages issues at this time, it should grant this conditional cross-petition to redefine that critical line.

CONCLUSION

If the Court grants the petition for a writ of certiorari in *California Federal Bank, FSB* v. *United States*, No. 04-1557, it should also granted this cross-petition for a writ of certiorari.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
STUART E. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
DAVID M. COHEN
JEANNE E. DAVIDSON
JOHN N. KANE, JR.
Attorneys

JUNE 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-5252

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

YERVIN K. BARNETT, DEFENDANT-APPELLANT

Decided and Filed: Feb. 16, 2005
Rehearing Denied: Mar. 9, 2005

BOYCE F. MARTIN, JR., Circuit Judge.

Yervin K. Barnett appeals his conviction and sentence for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). For the following reasons, we **AFFIRM** Barnett's conviction. However, we **VACATE** the sentence of the district court and **REMAND** for resentencing consistent with the Supreme Court's decision in *United States v. Booker*, —— U.S. ——, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

I.

In the early morning hours of July 4, 2002, Officer Corey Jefferson of the Memphis Police Department responded to a burglary call at 661 Shel Lane. When Jefferson arrived at the address, he flashed his spotlight at

the residence and observed a black male kneeling in front of a window with a long black object in his hand (although Jefferson initially testified that he may have seen the suspect climbing out of the window). The suspect, upon seeing Jefferson, threw the object down and ran to a nearby car and drove away. Officer Jefferson gave pursuit. Jefferson testified that the object in the suspect's hand looked like a shotgun, but he was not sure. He further testified that he was able to get "a pretty good look" at the suspect as he ran toward the car. During the pursuit, the suspect lost control of his car on a curve and ran over a curb and into a house. He then began to flee on foot. Jefferson pursued the suspect on foot for a short period of time, until Jefferson was unable to jump a fence and lost sight of the suspect. Jefferson then radioed to other officers the location where he last saw the suspect and returned to his squad car in an effort to form a perimeter around the area.

Within ten minutes, Officer Jane Martin, a member of the department's canine unit, arrived on the scene and began searching the area. Martin's dog apparently followed a trail to a shed where Yervin Barnett was hiding. Martin took Barnett into custody. Jefferson testified that upon seeing Barnett detained, he was able to recognize Barnett as the same individual he observed at 661 Shel Lane earlier that evening crouched in front of the window with the long dark object in his hand. While Barnett was in custody at the scene, he apparently told the officers that he was not acting alone that night. In response, Jefferson testified that he told Barnett that he was the only one he saw at the scene.

Officer Tina Crowe testified that she responded to 661 Shel Lane to perform a crime scene investigation on July 4, 2002. During her investigation, she recovered a

black and chrome rifle from the front yard of that address. At trial, Jefferson testified that the recovered gun featured in a picture (exhibit two) was the long black object that he saw the suspect holding in his hand.

The only witness called by the defense was Janice Bell. Bell testified that she was with Barnett on the evening of July 3 until around 11:00 p.m. or 12:00 a.m., and that Barnett had left in the presence of another man, James Molist, who subsequently died before trial.

At trial, the district court instructed the jury on the applicable law regarding possession of a firearm by a felon under 18 U.S.C. § 922(g). The court instructed:

> You should find that the Defendant had possession of the firearm, if he had control of it, even though it was not physically in his possession. But, it is not enough that the Defendant may have known about the firearm. A defendant possess [sic] a firearm only if he had control of it either alone or together with someone else. Next, I will talk about actual and constructive possession. Next, I want to explain something further about possession. The government does not necessarily have to prove that the Defendant physically possessed the firearm for you to find him guilty of this crime.
>
> The law recognizes two kinds of possession, actual possession and constructive possession. Either one of these, if proved by the Government, is enough to convict. To establish actual possession, the Government must prove that the Defendant had direct and physical control over the firearm and knew that he had control of it. To establish constructive possession, the Government must prove that the Defendant had the right to exercise physical control over

> the firearm and knew that he had this right. And that he intended to exercise physical control over it at sometime either directly or through other persons. For example, if you left something with a friend intending to come back later to pick it up or intending to send someone else to come and pick it up for you, you would have constructive possession of that thing, while it was in the actual possession of your friend. But, understand that just being present where something is located does not equal possession. The Government must prove that the Defendant had actual or constructive possession of the firearm and knew that he did. . . .

Counsel for Barnett stated in closing argument:

> We all know that people do burglaries when they are accompanied by other people. It could happen, right. We all know that every time a burglary happens, it is not just one person. It could be another person. . . . We also heard the statements made by Mr. Barnett given to Officer Jefferson. What did he tell you? Did you all catch anybody else? . . . Maybe, there was somebody else. Maybe there was. What did Officer Jefferson say? He didn't look for another person. Well, yes. I guess that there could have been somebody else. . . .
>
> You heard the testimony of Janice Bell. Janice Bell said, that Mr. Barnett was accompanied by another man. His name was James Molist. And I submitted his death certificate in this case. At 11:00 at night, 11:00 or 12:00 o'clock at night, that's pretty late. You remember the burglary happened about around 4:00, just a few hours later. I submit to you, that it

> is possible, that Mr. Molist was with Mr. Barnett that night. And that was possibly the other person.

In rebuttal closing, counsel for the United States stated:

> So, if you conspire with someone else to go and kick in the front door of a citizen's home, and invade that home, and take property from that home, without the permission of the homeowner or either you or your partner decide to grab a rifle from the home, then, both of you, under the law, have exercised control over it.

The defense objected and the district court sustained the objection to the use of the word "conspiracy," as there was no conspiracy charge in the case. The court instructed the jury to disregard anything the prosecutor said about conspiracy and that line of argument. Counsel for the United States did not use the word "conspiracy" again in commenting on the defense theory of the case.

Returning to his closing, counsel for the United States again argued: "If you and Mr. Molist, the Defendant and Mr. Molist, went to the home and broke into the home; and let's say that, it was Mr. Molist, who had the gun, the Defendant is still responsible." Counsel for Barnett again objected. In a side bar, the court responded to the government's argument: "Those are facts, that are not in evidence. There is no evidence, anything in the record. . . . [D]o we know that these were the two that did that? You didn't argue that on Direct." During the course of this bench conference, counsel for Barnett admitted that he had argued the theory that Molist, rather than Barnett, had been in possession of the firearm at the time of the

apparent burglary. With the court's permission, counsel for the United States continued his closing by responding to the defense's argument as follows: "Just, hypothetically, if two people broke into a home, and one of them possessed the gun, and then under this law, as the Judge has read it to you, both can be charged with possession of it. Because if your partner exercises control and possession, controlling possession, hypothetically, then, you do as well, under the law, as has been instructed to you by Her Honor."

On November 6, 2003, the jury convicted Barnett of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). At the sentencing hearing on February 25, 2004, the district court calculated Barnett's base offense level under the United States Sentencing Guidelines for "felon in possession of a firearm" to be 24 under section 2K2.1, but then added 2 points for his possession of a stolen firearm under section 2K2.1(b)(4), and 2 more points for reckless endangerment during flight under section 3C1.2. This yielded an adjusted offense level of 28. However, because Barnett had been convicted of at least three aggravated or violent felonies in the past, the district court was required to sentence him as an armed career criminal, which increased his offense level to 33 under section 4B1.4 of the Guidelines and imposed a statutory mandatory minimum of 180 months of imprisonment, *see* 18 U.S.C. § 924(e). With a criminal history category of VI, and an offense level of 33, the Guidelines required the district court to sentence Barnett within the Guidelines range of 235-292 months of imprisonment. Counsel for the United States requested sentencing in the upper end of the range, while Barnett requested a sentence in the

low end. In sentencing Barnett to 265 months of imprisonment, in the middle of the range, the court stated:

> Mr. Barnett, in this case, while this is a firearms case, looking back at your criminal history, there are five aggravated burglary convictions in your past. Those are very serious matters. The jury found you guilty of this offense. You are a career offender. The court finds that the low end of the guideline is not appropriate in this case. The court is going to sentence you to 265 months on this matter. . . . But that is going to be the court's sentence, that is a sentence a little bit over 22 years, and I believe that that is appropriate under the totality of the circumstances in this case, that is going to be the court's sentence, Mr. Barnett.

There was no objection to the district court's calculations of the appropriate Guidelines range at the sentencing hearing.

II.

On appeal, Barnett seeks reversal of his conviction, alleging insufficiency of the evidence and prosecutorial misconduct. He also seeks remand for resentencing in light of the Supreme Court's recent decision in *United States v. Booker*. We first consider the appeal of Barnett's conviction and then address whether his sentence should be vacated and remanded for resentencing.

A.

Barnett's first argument on appeal is that the evidence submitted at trial was constitutionally insufficient to sustain the jury's verdict finding him guilty of

being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Barnett claims that the only witness who testified that he had actually seen Barnett with the gun was Officer Jefferson who, according to Barnett, testified inconsistently "throughout the course of the trial." Because of these "inconsistences," Barnett argues that "no reasonable juror could have believed Officer Jefferson," and, therefore, there is insufficient evidence to sustain the jury's verdict.

When a conviction is attacked for insufficiency of the evidence, the evidence is viewed in the light most favorable to the prosecution to determine whether any rational trier of fact could have found each essential element of the offense beyond a reasonable doubt. *Hilliard v. United States*, 157 F.3d 444, 447 (6th Cir. 1998). This Court reverses a judgment for insufficiency of the evidence "only if [the] judgment is not supported by substantial and competent evidence upon the record as a whole." *United States v. Stone*, 748 F.2d 361, 363 (6th Cir. 1984). "Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt." *United States v. Spearman*, 186 F.3d 743, 745 (6th Cir. 1999).

We are convinced that Barnett's conviction was based on "substantial and competent evidence." Officer Jefferson testified at trial that he saw Barnett crouched outside the residence at 661 Shel Lane, holding a long black object that looked like a shotgun. He further testified that he saw Barnett throw the object to the ground as Barnett began to flee from the residence. Furthermore, Officer Crowe testified that upon investigating the residence after Barnett was apprehended, she found a black and chrome rifle in the front yard.

This evidence is sufficient evidence to support the jury's guilty verdict.

Barnett claims that because Officer Jefferson's testimony was, in his view, inconsistent and unreliable, the government did not present sufficient evidence to sustain the guilty verdict. We disagree. This Court has consistently stated that "[i]n cases in which we assess the sufficiency of the evidence, we do not weigh the evidence, assess the credibility of the witnesses, or substitute our judgment for that of the jury." *United States v. Wright*, 16 F.3d 1429, 1440 (6th Cir. 1994) (citing *United States v. Evans*, 883 F.2d 496, 501 (6th Cir. 1989)). Barnett makes no substantive argument that the evidence submitted to the jury was insufficient; rather, he merely argues that Jefferson cannot be believed. Consequently, we find that Barnett's argument "is merely a challenge to [the witness's] credibility, packaged as an insufficiency of the evidence claim." *United States v. Talley*, 164 F.3d 989, 996 (6th Cir. 1999). Thus, because "attacks on witness credibility are simply challenges to the *quality* of the government's evidence and not to the sufficiency of the evidence," *United States v. Adamo*, 742 F.2d 927, 935 (6th Cir. 1984) (emphasis in original), Barnett's challenge to his conviction on this ground must fail.

B.

Barnett also seeks reversal of his conviction based on the prosecutor's closing argument at trial, which, according to Barnett, included misstatements of the law and consequently amounted to prosecutorial misconduct. Allegations of prosecutorial misconduct contain mixed questions of law and fact that this Court reviews de novo. *United States v. Green*, 305 F.3d 422, 429 (6th

Cir. 2002). In reviewing allegations of prosecutorial misconduct, this Court conducts a two-step inquiry. *United States v. Francis*, 170 F.3d 546, 549 (6th Cir. 1999). First, we determine if the statements were improper. *Id.* If they were improper, we consider the following factors to determine if the comments were flagrant enough to warrant reversal: (1) whether the prosecutor's remarks or conduct tended to mislead the jury or prejudice the accused; (2) whether the remarks were isolated or extensive; (3) whether the remarks were accidentally or deliberately made; and (4) the overall strength of the evidence against the accused. *Id.*

We begin, and end, our analysis of Barnett's prosecutorial misconduct claim by considering whether the prosecutor's closing argument was improper. In determining whether it was improper, we "view the conduct at issue within the context of the trial as a whole." *United States v. Beverly*, 369 F.3d 516, 543 (6th Cir. 2004) (citing *United States v. Young*, 470 U.S. 1, 12, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)). When reviewing the conduct at issue, "[i]t is also appropriate to consider whether, and to what extent, a prosecutor's improper argument is invited by defense counsel's statements." *United States v. Jacobs*, 244 F.3d 503, 508 (6th Cir. 2001) (citing *United States v. Hickey*, 917 F.2d 901, 905 (6th Cir. 1990)).

In this case, the alleged prosecutorial misconduct involves the prosecutor's "continued insistence during rebuttal to instruct the jury on the law of conspiracy." In closing argument, counsel for the Untied States said that "if you conspire with someone else to . . . invade [a] home, or either you or your partner decide to grab a rifle from the home, then both you of under the law

have exercised control over it." The district court sustained Barnett's objection to the use of the word "conspiracy," and instructed the jury to disregard the government's arguments regarding conspiracy on the ground that it was not an element of the charge. The prosecutor then continued, essentially saying the same thing, but without using the word "conspiracy." Counsel for Barnett again objected, although in a side bar he admitted that the prosecutor was merely responding to defense counsel's argument that someone other than Barnett could have been holding the gun. Upon hearing that, the court allowed the prosecution to make its argument using the hypothetical quoted above.

We find that the prosecutor did not engage in misconduct. The prosecutor only mentioned "conspiracy" once in closing argument. The court, however, sustained Barnett's objection to the use of the word "conspiracy" and expressly admonished the jury regarding this statement, instructing them to disregard "anything [the prosecutor] said about conspiracy." This cured any possible impropriety of the prosecutor's use of the word "conspiracy." *See United States v. Monus*, 128 F.3d 376, 394 (6th Cir. 1997). The subsequent statements, none of which used the word "conspiracy," were not improper. They simply responded to Barnett's theory of the case—namely, that someone other than Barnett had possession of the gun. Barnett points to no case law suggesting that the government's statements—legitimately responding to the defense's theory during closing arguments—were improper. In fact, this Court has held that rebuttal statements that similarly respond to a defendant's closing argument are not prosecutorial misconduct. *See, e.g.*, *Jacobs*, 244 at 508 (holding that a prosecutor did not commit misconduct

since defense counsel "opened the door" to prosecution rebuttal by arguing facts not in the record); *Monus*, 128 F.3d at 394 (holding that a prosecutor's hypothetical questions to the jury in response to defense argument were proper).

While Barnett claims that the prosecutor's statements were legally incorrect, he fails to provide support for this proposition. It is well-established that actual or constructive possession of a firearm is sufficient to give rise to liability under section 922(g). *See, e.g.*, *United States v. DeJohn*, 368 F.3d 533, 545 (6th Cir. 2004) (quoting *United States v. Schreane*, 331 F.3d 548, 560 (6th Cir. 2003)). Thus, for the aforementioned reasons, we are convinced that the prosecutor's closing argument does not constitute prosecutorial misconduct.

III.

While this case was pending on appeal before this Court, the Supreme Court issued its decision in *United States v. Booker*. The Court issued two opinions in *Booker*, one authored by Justice Stevens concerning the merits of the constitutional challenge, and the other authored by Justice Breyer addressing the necessary remedy for what the Court found to be a constitutional violation. In Justice Breyer's opinion, the Court expressly severed and excised 18 U.S.C. § 3553(b)(1), which had required sentencing courts to impose a sentence within the applicable Sentencing Guidelines range, subject to departures in certain limited cases. *Booker*, —— U.S. at ——, 125 S. Ct. at 765. Consequently, under *Booker*, the Sentencing Guidelines are now advisory in all cases, including those that do not involve a Sixth Amendment violation. *Id.* at 769. In so holding, the Court expressly stated that its "remedial

interpretation of the Sentencing Act" must be applied "to all cases on direct review." *Id.* The *Booker* Court made it clear that this remedial scheme should apply not only to those defendants whose sentences had been imposed in violation of the Sixth Amendment, but also to those defendants who had been sentenced under the mandatory Guidelines without suffering a Sixth Amendment violation. *Id.* at 765 (noting that while defendant Fanfan's sentence did not violate the Sixth Amendment, the parties could seek resentencing under the new advisory regime); *see United States v. Davis*, 2005 WL 334370, at *8 (3d Cir. Feb. 11, 2005) (remanding for resentencing under *Booker* despite absence of Sixth Amendment violation). Because this case was pending on direct review when *Booker* was decided, the holdings of *Booker* are applicable in the case at bar.

A.

Barnett first argues that the application of the Armed Career Criminal Act, 18 U.S.C. § 924(e), in this case violated the Sixth Amendment principles established in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and reiterated in *Blakely v. Washington*, 542 U.S. ——, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *Booker* because the trial judge, rather than the jury, determined the nature of Barnett's previous convictions. According to Barnett, the government was required to plead in the indictment "every fact . . . used to increase [Barnett's] sentence above the statutory maximum, . . . [such as] whether or not the defendant's prior convictions were for crimes of violence or [for] controlled substances offenses."

Existing case law establishes that *Apprendi* does not require the nature or character of prior convictions to be determined by a jury. In *Apprendi*, the Supreme Court expressly excepted the fact of a prior conviction from the rule requiring issues of fact that increase a defendant's penalty to be submitted to the jury. 530 U.S. at 490, 120 S. Ct. 2348. This Court, among others, has rejected the argument that *Apprendi* requires the nature of prior convictions to be determined by a jury, holding instead that the district court's authority to determine the existence of prior convictions was broad enough to include determinations regarding the nature of those prior convictions. For example, in *United States v. Becerra-Garcia*, 28 Fed.Appx. 381, 2002 WL 22038, at *3-5 (6th Cir. Jan. 2, 2002) (unpublished opinion), a panel of this Court held that a district court did not violate *Apprendi*'s Sixth Amendment holding by determining whether the defendant's prior conviction was for an aggravated felony. In *Becerra-Garcia*, we cited a number of courts that have reached similar conclusions, such as the Eighth Circuit, which, in *United States v. Campbell*, 270 F.3d 702, 707-09 (8th Cir. 2001), held that *Apprendi* does not require the nature of a defendant's prior felony offenses as "violent felonies" or "serious drug offenses" under the Armed Career Criminal Act to be proved to a jury.

In the present case, Barnett, like the defendant in *Campbell*, claims that the failure of the district court to submit to the jury the question of the nature of his prior convictions under the Armed Career Criminal Act violated *Apprendi*. Given the case law establishing that *Apprendi* does not require the nature of prior convictions to be determined by a jury, we reject Barnett's argument on this issue. Moreover, there is no language

in *Booker* suggesting that the Supreme Court, as part of its remedial scheme adopted in that case, intended to alter the exception to *Apprendi* allowing district courts to consider the fact and nature of prior convictions without submitting those issues to the jury. Thus, for the foregoing reasons, we hold that there was no Sixth Amendment violation in the present case.

B.

Barnett's second argument is that given the Supreme Court's decision in *Booker* making the Sentencing Guidelines advisory, this Court should vacate his sentence and remand the case for resentencing "in light of the fact that the district court judge was sentencing the defendant as if the guidelines were mandatory." For the following reasons, we agree.

The parties conceded at oral argument that Barnett did not challenge his sentence on this or any other ground before the district court. Therefore, we review the district court's decision for plain error. *See Booker*, —— U.S. at ——, 125 S. Ct. at 769 (noting that whether a new sentencing hearing is required depends on "ordinary prudential doctrines," such as "whether the issue was raised below and whether it fails the 'plain-error' test"). In reviewing for plain error, we must consider whether there was plain error that affects substantial rights and that, in our discretionary view, seriously affects the fundamental fairness, integrity, or public reputation of judicial proceedings. *Johnson v. United States*, 520 U.S. 461, 466, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (citing *United States v. Olano*, 507 U.S. 725, 732, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)).

1.

We first consider whether there was error under current law. *United States v. Rogers*, 118 F.3d 466, 471-72 (6th Cir. 1997). In the instant case, Barnett was sentenced under the pre-*Booker* mandatory Sentencing Guidelines. The district court sentenced Barnett to 265 months of imprisonment followed by four years of supervised release, which fell within the Guidelines range of 235-292 months as required by 18 U.S.C. § 3553(b)(1). This sentencing procedure was correct at the time, but now, because section 3553(b)(1) has been excised and severed under *Booker*, the district court erred by treating the Guidelines as mandatory when it sentenced Barnett. Thus, the first requirement for finding plain error is satisfied in the present case.

2.

The next issue is whether the error was "plain." In this context, "'[p]lain' is synonymous with 'clear' or, equivalently, 'obvious.'" *Olano*, 507 U.S. at 733-34, 113 S. Ct. 1770. The Supreme Court has expressly held that "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal . . . it is enough that an error be plain at the time of appellate consideration." *Johnson*, 520 U.S. at 468, 117 S. Ct. 1544; *accord United States v. Calloway*, 116 F.3d 1129, 1136 (6th Cir. 1997). In the present case, at the time Barnett was sentenced, the Sentencing Guidelines were mandatory and not, as they are now, advisory. Furthermore, controlling case law pre-*Booker* consistently held that the Sentencing Guidelines were constitutional and mandatory even after the uncertainty occasioned by the Supreme Court's decision in *Blakely*. *See, e.g.*, *United States v. Koch*, 383 F.3d 436 (6th Cir. 2004) (en

banc), *overruled by Booker*, —— U.S. at ——, 125 S. Ct. at 769. *Booker*, however, effectuated a "clear" and "obvious" change in law by making the Sentencing Guidelines advisory. Given this change in the law, we hold that it was plain error for Barnett to be sentenced under a mandatory Guidelines regime that has now become advisory.

3.

Third, the defendant is required to demonstrate that the plain error "affect[ed] substantial rights." Fed. R. Crim. P. 52(b); *Olano*, 507 U.S. at 734, 113 S. Ct. 1770. As the Supreme Court reiterated in *United States v. Cotton*, 535 U.S. 625, 632, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002) (quoting *Olano*, 507 U.S. at 734, 113 S. Ct. 1770) (emphasis added), the phrase "affect substantial rights" is generally synonymous with "prejudicial," which "*usually* means that the error 'must have affected the outcome of the district court proceedings.'" However, the Supreme Court has noted, and this Circuit has recognized, two exceptions to the requirement that the defendant demonstrate that the error "affected the outcome of the district court proceedings." First, there is a class of so-called "structural" errors, which, the Supreme Court has instructed, "can be corrected regardless of their effect on the outcome." *Olano*, 507 U.S. at 735, 113 S. Ct. 1770. "A 'structural' error is a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Johnson*, 520 U.S. at 468, 117 S. Ct. 1544 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). The Supreme Court has found "structural errors only in a very limited class of cases," *id.*, such as where a defendant is denied certain fundamental rights, including the

right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984), the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984), and the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). In such cases, because the error was "structural," the defendant was not required to demonstrate that he was prejudiced, or, in other words, that the error affected the outcome of the district court proceedings.

Second, the Supreme Court's decision in *Olano* "made it quite clear that in some situations a presumption of prejudice is appropriate" if the defendant cannot make a specific showing of prejudice. *Manning v. Huffman*, 269 F.3d 720, 726 (6th Cir. 2001) (holding that a presumption of prejudice was appropriate in a habeas case where an alternate juror participated in jury deliberations, even absent evidence that the error affected the jury's deliberations and its verdict); *United States v. Segines*, 17 F.3d 847, 852 (6th Cir. 1994) (noting that "[t]he Supreme Court has stopped short . . . of establishing a blanket rule that shifts the burden of persuasion on the defendant in all cases. . . . [There also may be] 'errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice.'") (quoting *Olano*, 507 U.S. at 735, 113 S. Ct. 1770).

Courts have presumed prejudice, and have thus found the third prong of plain error review satisfied, in cases where the inherent nature of the error made it exceptionally difficult for the defendant to demonstrate that the outcome of the lower court proceeding would have been different had the error not occurred. For instance, in *United States v. Adams*, 252 F.3d 276, 287

(3d Cir. 2001), the Third Circuit found plain error where the defendant was not given the opportunity to exercise his right of allocution. In considering whether the defendant could show that the court's error was prejudicial, the court expressly noted the difficulty in establishing that the allocution error affected the outcome of the district court proceedings. *See id.* ("In order to prove that the error actually 'affected the outcome of the district court proceedings,' [the defendant] would have to point to statements that he would have made at sentencing, and somehow show that these statements would have changed the sentence imposed by the District Court."). Because of "the nature of the right and the difficulty of proving prejudice from its violation," *id.* at 287, the court concluded that it would presume prejudice rather than require the defendant to make the "enormously difficult" showing that the error affected the district court's sentencing decision, *id.* (quoting *United States v. Alba Pagan*, 33 F.3d 125, 130 (1st Cir. 1994)) (internal quotation marks omitted). This Court reached a similar result in *United States v. Riascos-Suarez*, 73 F.3d 616, 627 (6th Cir. 1996), where we remanded for resentencing because the defendant was not afforded the opportunity to allocute and the error "could have had an effect on his sentence." *See also United States v. Cole*, 27 F.3d 996, 999 (4th Cir. 1994) (implicitly adopting presumption of prejudice in plain error context where a defendant was denied his right to allocute and, thus, "may have been able to persuade the court" that a lower sentence was appropriate). The continued validity of *Olano* 's category of "presumed prejudicial" errors was recently reaffirmed by the Fifth Circuit sitting en banc in" *United States v. Reyna*, 358 F.3d 344, 351-52 (5th Cir.), *cert. denied*, —— U.S. ——, 124 S. Ct. 2390, 158 L. Ed. 2d

966 (2004), where the court held that it would presume that a defendant suffered prejudice from a court's failure to allow him to allocute, despite the defendant's inability to demonstrate how the error affected the sentence imposed by the district court.

In addition to the allocution context, courts have been willing to presume prejudice, both implicitly and explicitly, in plain error review of other types of errors that, by their nature, keep the party from being able to demonstrate that, in the absence of that error, the outcome of his trial or sentence would have been different. For example, in *United States v. Plaza-Garcia*, 914 F.2d 345, 347-48 (1st Cir. 1990), then-Chief Judge Stephen Breyer vacated a sentence that fell within both erroneously applied and correct Guideline ranges under the plain error doctrine because the sentence "may well have been influenced by the [erroneous] sentencing recommendation." *See also United States v. Syme*, 276 F.3d 131, 153-55 (3d Cir. 2002) (holding that even though a constructive amendment to an indictment does not constitute a "structural" error, it nevertheless must be "presumed prejudicial" in light of the difficulty of proving prejudice resulting from constructive amendments).

As established above, the plain error in the instant case is that the sentencing court failed to treat the Sentencing Guidelines as advisory in determining Barnett's sentence. The record shows that the district court imposed a sentence based on the assumption—which, again, was correct at the time but incorrect in light of *Booker*—that the Guidelines were mandatory. We are convinced that this is an appropriate case in which to presume prejudice under the Supreme Court's decision in *Olano*. First, if the district court in this case had not

been bound by the range prescribed in the Guidelines, Barnett may have received a lower sentence. It is uncontested that the district court would have had the discretion, under the new advisory Guidelines regime, to impose a sentence as low as 180 months of imprisonment, the statutory minimum provided by the Armed Career Criminal Act, 18 U.S.C. § 924(e), which is significantly lower than the 265 months he received under the application of the mandatory Guidelines.

Second, it would be exceedingly difficult for a defendant, such as Barnett, to show that his sentence would have been different if the district court had sentenced him under the advisory, rather than the mandatory, Guidelines framework. This is true in part because of the fundamental alteration of the sentencing process brought about by *Booker*'s remedial holding. Under the new post-*Booker* framework, the district court is empowered with greater discretion to consider the factors provided in 18 U.S.C. § 3553(a) in determining a proper sentence. This discretion was not present at the time Barnett was sentenced under the mandatory Guidelines. As the Second Circuit recently observed, it is "impossible to tell what considerations counsel for both sides might have brought to the sentencing judge's attention had they known that they could urge the judge to impose a non-Guidelines sentence." *United States v. Crosby*, No. 03-1675, slip op. at 28-29 (2d Cir. Feb. 2, 2005). Under the new post-*Booker* framework, counsel are now able to present aggravating and mitigating circumstances "that existed at the time [of pre-*Booker* sentencing] but were not available for consideration under the mandatory Guidelines regime." *Id.* at 35.

This fundamental difference between the post-*Booker* sentencing frameworks illustrates our deep concern with speculating, based merely on a middle-of the-range sentence imposed under the mandatory Guidelines framework, that the district court would not have sentenced Barnett to a lower sentence under the advisory Guidelines regime. That the district court chose to sentence Barnett in the middle of that mandatory range does not necessarily suggest that the district court would now feel that 265 months of imprisonment is the proper sentence for Barnett. Nor does it suggest that the court would not have sentenced Barnett to a lower sentence if it had the discretion, which it does now, to apply the Guidelines in an advisory fashion.

The extraordinary difficulty facing defendants such as Barnett in showing that the use of mandatory, rather than advisory, Guidelines affected the outcome of their sentencing proceedings is exacerbated by the fact that to make such a showing, the defendants would presumably have to demonstrate that the district court somehow intimated that it felt constrained by the Guidelines or that it would have preferred to sentence the defendant to a lower sentence. This, in our view, is too exacting a burden, given the fact that this Court, along with others, had repeatedly instructed sentencing courts pre-*Booker* to impose sentences within the applicable mandatory Guidelines range, with limited exceptions, and had consistently upheld the constitutionality of the Guidelines and their mandatory nature, even after the Supreme Court's decision in *Blakely*. *See, e.g.*, *Koch*, 383 F.3d at 440 (noting that "our Circuit has consistently turned back Sixth Amendment challenges to Guideline enhancements so long as the resulting sentence falls below the congressionally-prescribed statu-

tory maximum"), *overruled by Booker*, —— U.S. at ——, 125 S. Ct. at 769. This well-established case law substantially undermined any need or incentive for sentencing courts pre-*Booker* to note their objections and reservations in sentencing defendants under the then-mandatory Guidelines. It would be improper for this Court now to require defendants such as Barnett to produce this type of evidence—that sentencing courts had no reason to provide under our pre-*Booker* case law—in order to establish that their substantial rights have been affected.

As the Fourth Circuit recently noted, in sentencing under the mandatory Guidelines, "the district court was never called upon to impose a sentence in the exercise of its discretion. . . . We simply do not know how the district court would have sentenced [the defendant] had it been operating under the regime established by *Booker*," *United States v. Hughes*, 396 F.3d 374, at 381 n.8, 2005 WL 147059, at *5 n.8 (4th Cir. Jan. 24, 2005). Instead of speculating as to the district court's intentions in the pre-*Booker* world, and trying to apply those intentions to predict the same court's sentence under the post-*Booker* scheme, we are convinced that the most prudent course of action in this case is to presume prejudice given the distinct possibility that the district court would have imposed a lower sentence under the new post-*Booker* framework and the onerous burden he would face in attempting to establish that the sentencing court would have imposed such a sentence.

This is not to discount the possibility, however, that in other cases the evidence in the record will be sufficient to rebut the presumption of prejudice. While "an appellate court will normally be unable to assess the significance of any [sentencing] error that might have

been made," *Crosby*, slip op. at 35, we can imagine cases where the trial record contains clear and specific evidence that the district court would not have, in any event, sentenced the defendant to a lower sentence under an advisory Guidelines regime. *See Crosby*, slip op. at 35 (noting that "an educated guess as to the likely outcome of a remand . . . might be wrong, absent a *clear indication* at the original sentencing supporting the inference that the same sentence would have been imposed under the post-*Booker*/*Fanfan* regime") (emphasis added). This, however, is not one of those cases. While the dissent claims that there is "concrete," "affirmative," and "ample" evidence indicating that the district court would not give Barnett a lower sentence on remand under the post-*Booker* framework, the only evidence that the dissent cites for this proposition is the district court's middle-of-the-range sentence imposed under the mandatory Guidelines regime. This, in our view, is insufficient to rebut the presumption that Barnett was prejudiced by the imposition of a sentence under the mandatory Guidelines.

In summary, because Barnett has demonstrated that he was sentenced under the Sentencing Guidelines as if they were mandatory, rather than advisory, and because he has shown that the district court might have exercised its discretion to impose a lower sentence had it known that the Guidelines were advisory, we hold that Barnett's substantial rights have been affected.

4.

"The final step in plain error analysis is to determine whether this case warrants the exercise of our discretion." *Rogers*, 118 F.3d at 473. We correct plain errors affecting substantial rights in those cases where the

error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 80 L.Ed. 555 (1936).

We conclude that an exercise of our discretion is appropriate in the present case. Barnett's sentence was imposed under a framework that has now been substantially altered by *Booker's* severing and excising of 18 U.S.C. § 3553(b)(1), the provision that made the Guidelines mandatory. In our view, it would be fundamentally unfair to allow Barnett's sentence, imposed under a mandatory Guidelines regime, to stand in light of this substantial development in, and alteration of, the applicable legal framework. The better course, we believe, is to vacate Barnett's sentence and remand for resentencing, thus affording the district court the opportunity to re-sentence him in the first instance. "We would be usurping the discretionary power granted to the district courts by *Booker* if we were to assume that the district court would have given [the defendant] the same sentence post-*Booker*." *United States v. Oliver*, 397 F.3d 369, at 381 n.3, 2005 WL 233779, at *8 n.3 (6th Cir. Feb. 2, 2005); *see Williams v. United States*, 503 U.S. 193, 205, 112 S. Ct. 1112, 117 L. Ed. 2d 341 (1992) ("[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.") (quoting *Solem v. Helm*, 463 U.S. 277, 290 n.16, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983)).

Furthermore, we decline to consider the reasonableness of Barnett's sentence imposed under the Guidelines without first giving the district court the opportunity to re-sentence Barnett under the new post-

Booker framework. As the Fourth Circuit recently stated:

> In determining whether the exercise of our discretion is warranted, it is not enough for us to say that the sentence imposed by the district court is reasonable irrespective of error. The fact remains that a sentence has yet to be imposed under a regime in which the guidelines are treated as advisory. To leave standing this sentence simply because it may happen to fall within the range of reasonableness unquestionably impugns the fairness, integrity, or public reputation of judicial proceedings. . . . This is so because the district court was never called upon to impose a sentence in the exercise of its discretion. That the particular sentence imposed here might be reasonable is not to say that the district court, now vested with broader sentencing discretion, could not have imposed a different sentence that might also have been reasonable.

Hughes, 396 F.3d 374, 2005 WL 147059, at *5 n.8; *accord Crosby*, slip op. at 28 ("Even if reasonable as to length, a sentence unreasonable for legal error in the method of its selection is cause for concern because, in many cases, it will be impossible to tell whether the judge would have imposed the same sentence had the judge not felt compelled to impose a Guidelines sentence."). Because we are convinced that sentencing Barnett under mandatory Guidelines "seriously affect[ed] the fairness, integrity [and] public reputation of judicial proceedings," *Atkinson*, 297 U.S. at 160, 56 S. Ct. 391, now that we know those Guidelines are advisory, we exercise our discretion to notice the plain sentencing error in the present case and vacate Barnett's sentence.

C.

We note briefly that because we have concluded that the district court committed plain error in this case, that error cannot constitute "harmless error." An error may be harmless only where the government is able to prove that none of the defendant's substantial rights has been affected by the error. *See* Fed. R. Crim. P. 52(a). Because this Court has determined that the error in this case affected Barnett's substantial rights, the government, therefore, is unable to establish that the error was harmless.

IV.

For the reasons stated herein, we **AFFIRM** Barnett's conviction, but **VACATE** Barnett's sentence and **REMAND** for resentencing consistent with this opinion and with the Supreme Court's decision in *Booker*.

GWIN, District Judge concurring.

I concur in the Court's opinion, but I write separately to speak to additional considerations.

In addition to the majority's reasons offered for remand, two additional considerations warrant remand. First, 18 U.S.C. § 3742(f)(1) bolsters our decision to remand Barnett's case for resentencing. This statute instructs when the court of appeals shall remand for error in applying the Guidelines. Section 3742(f)(1) states: "If the court of appeals determines that . . . the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court *shall remand* the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. § 3742(f)(1)

(emphasis added). Section 3742(f)(1) survives *Booker*,[1] and it suggests that remand for resentencing is appropriate when the district court errs in applying the Guidelines. The Supreme Court has construed Section 3742(f)(1) concerning the circumstances for remanding for resentencing. *See Williams v. United States*, 503 U.S. 193, 203, 112 S. Ct. 1112, 117 L. Ed. 2d 341 (1992).

In *Williams*, the Supreme Court stated that "remand is required only if the sentence was imposed as a result of an incorrect application of the Guidelines." *Id.* at 202-03, 112 S. Ct. 1112 (internal quotation marks and emphasis omitted). Although the cases after *Williams* arose in the context of harmless error and not plain error, we interpreted the Supreme Court's decision in *Williams* as establishing that "remand [is] appropriate . . . unless [the] party defending [the] sentence convinces [the] court that [the] district court would have imposed [the] same sentence absent misapplication of guideline." *United States v. Parrott*, 148 F.3d 629, 636 (6th Cir. 1998); *see also United States v. Vandeberg*, 201 F.3d 805, 812 (6th Cir. 2000) ("Remand is appropriate unless the appellate court is convinced that the trial court would have imposed the same sentence absent [its] misinterpretation of the guideline.") (internal quotation marks omitted).

Because of the posture of Barnett's appeal, the cases interpreting Section 3742(f)(1) are more persuasive. Barnett was sentenced before the Supreme Court's decisions in *Blakely* and *Booker*. At the time Barnett was sentenced, all controlling authority suggested that any challenge to the mandatory application of the

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[1] In *Booker*, the Supreme Court excised 18 U.S.C. § 3742(e), which governed our standard of review.

Guidelines would fail. Not surprisingly, Barnett's counsel raised no argument that the mandatory application of the Guidelines was error.

The district court found Barnett to be an armed career criminal under 18 U.S.C. § 924(e). The Guidelines caused Barnett's base offense level to be set at 33 based upon criminal history, U.S.S.G. § 4B1.4. Without his criminal history, Barnett's offense level, after adjustments, was 28. As the majority points out, this finding of criminal history did not implicate the Sixth Amendment even though it had a major impact upon the sentence that Barnett faced. Because the Sixth Amendment was not involved, Barnett had no reason to object under *Apprendi.* Finally, the record shows that the district judge felt constrained by the Guidelines, which required her to sentence within offense level 33. While the record is sparse on the district judge's reasons for imposing the sentence of 265 months, the record does show that the district judge selected offense level 33 solely because of the mandatory nature of the Guidelines.

Cases interpreting Section 3742(f)(1) further suggest that remand is appropriate. In remanding one case, we observed, "Hence, there is a possibility that the district court's ultimate conclusion was influenced by its misunderstanding of its sentencing options." *United States v. Schray*, 383 F.3d 430, 434 (6th Cir. 2004) (remanding and concluding no harmless error); *accord Kelly v. United States*, 29 F.3d 1107, 1111 (7th Cir. 1994) ("But absent an express statement that the court would impose the same sentence even if a different range were applicable, it is difficult to imagine a case in which an appeals court could declare with the requisite degree of confidence that the application of an incorrect range

would amount to harmless error."), *overruled on other grounds*, *United States v. Ceballos*, 302 F.3d 679, 690-91 (7th Cir. 2002).

Given the substantial change in the law after *Booker*, we see no reason to depart from these precedents here.

Second, we consider this case in light of one of the underlying purposes of the plain error doctrine: the economy of judicial resources. In summary, an unnecessarily restrictive plain error analysis will result in substantial additional work for this court and will save the district courts almost no time. Moreover, a restrictive plain error rule would result in the unseemly result of defendants being sentenced under rules that were not valid and without any notice that the rules were not valid. Given the minimal time needed to allow the district court to sentence Barnett under the correct standard, I would remand this matter for re-sentencing.

The efficient administration of justice is one of the underlying purposes of the plain error doctrine. The plain-error analysis promotes the efficient administration of justice in two regards. First, the rule allows consideration of some errors despite no trial objection. By considering certain errors without objection, the rule avoids incessant trial objections, objections made solely to preserve an issue upon the possibility that there may be an intervening change in the law. As the Supreme Court has found, a rule that never considered errors unless there had been a trial objection "would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997). Second, if every error resulted in reversal, trial courts would spend inordinate

amounts of time re-trying cases that involved insubstantial errors.

Endeavoring to avoid both these inefficiencies, the plain-error rule limits errors that result in remand to those that involve substantial rights and a showing that a defendant has been prejudiced. As the Seventh Circuit has stated, "The plain-error standard, which applies when a district court has not been given the first opportunity to correct alleged mistakes, strikes a balance among the proper functioning of the adversary system, *efficiency in managing litigation*, and the demands of justice." *United States v. Wilson*, 237 F.3d 827, 836 (7th Cir. 2001) (emphasis added), *cert. denied*, 534 U.S. 840, 122 S. Ct. 97 (2001). In the posture that we now find ourselves after the Supreme Court's decision in *United States v. Booker*, 543 U.S. ——, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), I believe it more efficient to *remand* this case to the district court for re-sentencing. Otherwise, we adopt a rule that results in an inordinate expenditure of appellate court resources, yet saves the district court little.

The fourth prong of the plain error analysis directs attention to whether unraised errors "seriously affect the fairness, integrity, or public reputation of judicial proceedings," and gives the court discretion in determining whether to remand a case to the trial court. Among the concerns that appellate courts take into account, not least is a concern for judicial economy.[2] Indeed, many courts decline to remand where a new

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[2] We may consider judicial resources when applying the fourth prong of the plain error test. This analysis does not affect the third prong, which concerns whether the error "affects the substantial rights" of the defendant.

trial would expend an unnecessary amount of judicial resources. *See, e.g.*, *United States v. Cedelle*, 89 F.3d 181, 186 (4th Cir. 1996) (under the circumstances, "to expend the judicial resources necessary for a retrial would be more detrimental to the fairness, integrity, and public reputation of judicial proceedings than permitting [Appellants'] convictions to stand"); *United States v. Ross*, 77 F.3d 1525 (7th Cir. 1996) (finding the first three factors of the plain error test met but determining that "it would be an unnecessary waste of judicial resources to retry this case" based on the error at hand); *United States v. Izaguirre-Losoya*, 219 F.3d 437, 442 (5th Cir. 2000) (finding, under the circumstances, that to remand would be "an empty formality and waste of judicial resources").

Notably, in the cases cited above, appellate courts declined to remand, because to *retry* a case would be to expend a great amount of resources. By contrast, where a re-sentencing is at issue, the costs are far less. *See, e.g.*, Charles A. Wright, *Federal Practice and Procedure* § 856, at 511-12 (2004) ("Some have suggested that errors in sentencing, unraised below, should be reviewed with a less deferential standard as the costs of re-sentencing are lower than the costs of retrial."). In this vein, we note the Second Circuit case of *United States v. Sofsky*, 287 F.3d 122 (2d Cir. 2002). In *Sofsky*, the Second Circuit stated that, because remanding would not precipitate a new trial but, rather, a re-sentencing, "it appears that in the sentencing context there are circumstances that permit us to relax the otherwise rigorous standards of plain error review to correct sentencing errors." *Id.* at 125.

Having presided over hundreds, if not thousands, of sentencings, I believe the time devoted to post-*Booker*

re-sentencing would be small. Since the 1940s, district court judges have submitted monthly reports that generally detail the time they expend on various court functions, the JS-10 report. These reports for the Northern District of Ohio indicate that the amount of time spent on sentencing before *Booker* averaged less than 45 minutes.[3] Sentencing on remand would be significantly less.

At resentencing, the sentencing court is already familiar with the pre-sentence report. Given earlier opportunities to present evidence on disputed guideline calculations, there would be no need to reopen the case for hearing on those issues. The re-sentencing hearing would simply allow the trial court to apply the proper standard, typically with only limited input from the defendant.

In contrast, the time spent by each court of appeals panel required to analyze the application of plain error, would be multiples greater. And the result of this expenditure of judicial resources would be that a defendant was sentenced using a standard that was clearly wrong.

I do not suggest that plain errors in sentencing should always be subject to less rigorous review. I do suggest that in the situation in which we here find ourselves, it is appropriate to consider judicial resources. Here, as the Court lays out in its opinion, the first three

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[3] The JS-10 report may overstate the time used for sentencing. The minimum time increment is one-half hour. Even using this minimum time increment, in the three month period between November 2004 to January 2005, Northern District of Ohio judges sentenced 222 defendants and averaged less than 45 minutes per sentencing hearing.

prongs of the plain error test are met. Further, the "fairness, integrity, and reputation of judicial proceedings" are very much at stake—defendants with active cases on appeal were sentenced under the wrong rules.

Guessing at what a district judge would have done had she known the greater discretion afforded by *Booker* affects the public reputation of judicial proceedings. Rather than attempt to predict what a district court would have done, we should follow the more efficient path—we should remand this matter to the district court. As *Williams v. United States* reiterated: "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." 503 U.S. 193, 205, 112 S. Ct. 1112, 117 L. Ed. 2d 341 (1992) (citations omitted).

BOGGS, Chief Judge, concurring in part and dissenting in part.

Although I concur in all other parts of the court's opinion, I do not believe that Barnett has shown that any error in sentencing was prejudicial. I therefore respectfully dissent in part.

I agree with the court's conclusion that the district court's use of the pre-*Booker* sentencing rubric was plainly erroneous in light of present law, but I do not believe Barnett has shown the error prejudiced his sentencing. First, as a factual matter, I believe the record indicates the district court felt the sentence was fair and would therefore give the same sentence post-*Booker*. Second, as a matter of law, I believe the court errs by concluding that we should reverse when the record is silent as to prejudice.

I

In *United States v. Booker*, —— U.S. ——, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), the Supreme Court found the Sentencing Guidelines unconstitutional because they permitted judicial fact-finding to increase a sentence beyond that authorized by the jury conviction, in violation of the Sixth Amendment. *Booker* produced two majority opinions, both by a 5-4 vote, with only Justice Ginsberg joining both opinions. The first, by Justice Stevens, found the Guidelines unconstitutional. *Id.* at 745-56. The second, by Justice Breyer, provides the remedy. *Id.* at 756-70. The Court's solution was to strike 18 U.S.C. § 3553(b)(1), which is the provision making the Guidelines mandatory. *Id.* at 756-57. The Court left intact the remainder of the Guidelines in an advisory role, instructing that they must be consulted by a sentencing court but are no longer binding. *Ibid.* The Supreme Court has instructed us to apply *Booker* to cases on direct review using "ordinary prudential doctrines" and applying the "plain-error test." *United States v. Booker*, —— U.S. ——, ——, 125 S. Ct. 738, 769, 160 L. Ed. 2d 621 (2005). The Court also stated that not "every appeal will lead to a new sentencing hearing." *Ibid.*

Plain error is a highly deferential standard of review: "[t]he Supreme Court and numerous federal courts have repeatedly stated that the plain error doctrine is to be used sparingly, only in exceptional circumstances, and solely to avoid a miscarriage of justice." *United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 483 (6th Cir. 1999) (quotations omitted). Before we can consider reversing for plain error, the defendant must show that error was prejudicial: that it affected his "substantial rights," or, in other words, that it "affected the outcome

of the district court proceedings." *United States v. Cotton*, 535 U.S. 625, 632, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002). The defendant bears the burden of showing that the error was prejudicial and altered the outcome. *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993).

There is ample evidence in the record that the district court believed Barnett's sentence of 265 months in prison to be proper in light of traditional sentencing considerations. Based on offense level and history, the Guidelines dictated a sentencing range of 235 to 292 months, and the district court imposed a sentence of 265 months. Thus, the district court eschewed the use of discretion that it clearly possessed, pre-*Booker*, to reduce the sentence by as much as 30 months. In this case, all that *Booker* added was some, though not unfettered, discretion to reduce the sentence yet further, though with significant restraints. *Booker*, —— U.S. at —— - ——, 125 S. Ct. at 764-65 (stating that the Sentencing Guidelines still impose a number of requirements on judges, such as the requirement to consider the Guideline sentencing range, the need to avoid sentencing disparities, reasonableness of the sentence, and other statutory factors). Within the Guideline range, district judges have always exercised their discretion in light of traditional factors, such as the nature of the offense, the character of the defendant, the deterrent effect, and the future dangerousness of the defendant. *See* 18 U.S.C. § 3553(c) (when the Guideline range exceeds 24 months, the district court must state in open court the reason for choosing a point in that range); *United States v. Zackson*, 6 F.3d 911, 923-24 (2d Cir. 1993) (remanding for resentencing when the district court failed to articulate any reason at all for why a

particular sentence was selected). When the district court selected a sentence in the middle of the permissible range, it presumably did so because it felt that this would be the just sentence in light of the articulated traditional factors. Had it believed that Barnett warranted a more lenient sentence for any reason, the court was free to reduce his term of imprisonment. The fact that it did not is a strong indication that the district court did not think a lighter sentence was warranted.[1] On this record, I conclude that the mandatory nature of the Guidelines at the time Barnett was sentenced did not affect the sentencing outcome, and certainly that he has not demonstrated such an effect.

Even assuming, *arguendo*, that the record is silent as to prejudice, we should still affirm. The court states that it "refuse[s] to speculate as to the district court's intentions in the pre-*Booker* world." Op. at 528-29. This abrogates the long-held rule that plain error review *requires* us to determine whether the outcome would be different had the law been correctly applied. This is the heart of the "affects substantial rights" inquiry. *Jones v. United States*, 527 U.S. 373, 394-95,

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[1] In contrast, when a district court sentences at the bottom of a Guideline range, this would support an inference of possible prejudice. If the district court believed, in light of traditional factors, that a defendant should receive a sentence lower than the Guideline range, it would necessarily, in the pre-*Booker* world, impose a sentence at the bottom of the range. Thus when there is a sentence at the bottom of the Guideline range there are two possibilities: 1) that the district court thought that the minimum Guideline sentence was appropriate, or 2) that the district court preferred some sentence below the minimum Guideline sentence. Since the set of possible sentences in the second option is always the larger of the two, a sentence at the Guideline minimum suggests the district court might have been more lenient had it felt free to do so.

119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999) ("Where the effect of an alleged error is so uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights."); *Cotton*, 535 U.S. at 632, 122 S. Ct. 1781 (for plain error to have affected substantial rights, it "must have affected the outcome of the district court proceedings") (quotations omitted). What the court dismisses as speculation is precisely the exercise that we must undertake in plain error review. The court does not identify even a sliver of evidence suggesting Barnett would have received a different sentence had the district court applied the post-*Booker* law. Indeed, it cannot do so, because no such evidence exists. Instead, the court grasps onto only the "distinct possibility that the district court would have imposed a lower sentence under the new post-*Booker* framework." Op. at 528-30. A different sentence cannot be conclusively ruled out, but to reverse we must find more than the mere metaphysical possibility that the outcome might have been different. There must be some affirmative evidence to suggest that the error likely altered the outcome before we can consider reversing. Because there is no such evidence, Barnett cannot show that his substantial rights were affected.

II

Perhaps recognizing that the evidence in this case does not support a finding of prejudice, the court argues that prejudice should be presumed. The court believes that we should presume prejudice when the "inherent nature of the error made it exceptionally difficult for the defendant to demonstrate that the outcome of the lower court proceeding could have been different had the error not occurred." Op. at 526-27. This inverts the

burden in plain error review. It is well settled that the *defendant* must show prejudice before a reviewing court may reverse. *Olano*, 507 U.S. at 734, 113 S. Ct. 1770. I do not believe this inversion is warranted. Moreover, even if there were such a presumption, it is rebutted by affirmative evidence that the district court believed its sentence to be appropriate in light of traditional factors.

Contrary to the court's suggestion, the Supreme Court has never put its imprimatur on the idea that we may presume prejudice in plain error review. The passage upon which the court relies is a single sentence in a Supreme Court opinion refusing to consider the issue. *Olano*, 507 U.S. at 735, 113 S. Ct. 1770 ("Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice."). Indeed, if the Supreme Court believes that we should presume prejudice when it would be difficult for the defendant to establish it, it is hard to explain why the Court has passed up so many opportunities to articulate such a doctrine.

The Supreme Court has repeatedly applied standard plain error review even in circumstances where it would be "exceptionally difficult" for the defendant to show prejudice. In the capital case of *Jones*, 527 U.S. at 373, 119 S. Ct. 2090, the Court considered possible prejudice from jury instructions that the defendant alleged may have misled the jury into believing the judge would impose a lesser sentence if the jury could not unanimously decide on either a life sentence or the death penalty. It would obviously be exceptionally difficult to show that this alleged error affected the sentence, since jury deliberations are secret. The Court nonetheless applied standard plain error review for prejudice:

> Moreover, even assuming that the jurors were confused over the consequences of deadlock, petitioner cannot show the confusion necessarily worked to his detriment. It is just as likely that the jurors, loath to recommend a lesser sentence, would have compromised on a sentence of life imprisonment as on a death sentence. *Where the effect of an alleged error is so uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights.* In *Romano*, we considered a similar argument, namely, that jurors had disregarded a trial judge's instructions and given undue weight to certain evidence. In rejecting that argument, we noted that, even assuming that the jury disregarded the trial judge's instructions, "[i]t seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so." Any speculation on the effect of a lesser sentence recommendation, like the evidence in *Romano*, would have had such an indeterminate effect on the outcome of the proceeding that we cannot conclude that any alleged error in the District Court's instructions affected petitioner's substantial rights.

Id. at 394-95, 119 S. Ct. 2090. The Eleventh Circuit has determined that *Jones* is controlling in plain error review of pre-*Booker* sentences. *United States v. Rodriguez*, 398 F.3d 1291, 1306, 2005 WL 272952 (11th Cir. Feb. 4, 2005) ("where the effect of an error . . . is uncertain or indeterminate—where we would have to speculate—the appellant has not met his burden of showing a reasonable probability the result would be

different but for the error; he has not met his burden of showing prejudice"). I agree.

The fact that there is no evidence supporting Barnett's claim of prejudice does not mean it is categorically "extraordinarily difficult" for defendant's to establish prejudice in pre-*Booker* sentencing. In fact, we often have had evidence on the record when district courts are dissatisfied with the sentence the Guidelines required them to give. Sentencing courts are required by law to give reasons in open court for the sentence they select whenever the range is greater than 24 months. 18 U.S.C. § 3553(c). And even when this rule does not apply, district courts typically explain their chosen sentence. We may also infer possible prejudice when a district court sentences at the bottom of the range. *See supra* n.1. It is no more difficult to establish prejudice here than in the vast run of cases involving plain error review.

Nor did *Booker* expand the factors a district court could consider when selecting a sentence. The court suggests that now counsel could present aggravating and mitigating circumstances that were "not available for consideration under the mandatory Guidelines regime," Op. at 527-28 (quotations removed), but the court does not indicate what those additional circumstances might be. This argument ignores a fundamental feature of the Guidelines: they present a sentencing court with a *range*, from which it must select a sentence. In this case the range was nearly five years—57 months. Counsel already had every reason and every opportunity to present any mitigating circumstance that might possibly have saved Barnett from an additional five years in prison. Any arguments that might be raised post-*Booker* about culpability, future danger-

ousness, offsetting good works, family obligations, or any other mitigating circumstance were also fair game pre-*Booker*, and these arguments for mitigation have been regularly invoked by defense counsels in pre-*Booker* sentencing proceedings. *United States v. Riascos-Suarez*, 73 F.3d 616, 627-28 (6th Cir. 1996) (finding reversible error when the defendant was not offered the opportunity to give mitigating evidence at sentencing). The Guidelines never placed any limits on the ability of the district court to consider these factors, so there is no reason to remand so the district court may consider additional circumstances.[2]

Most importantly, the presumption is irrelevant because here we have concrete evidence in the record that the district court had no desire to give Barnett a lower sentence. The district court, in light of traditional factors, could have given Barnett 30 months less in prison if it had believed such a sentence warranted. We need not speculate as to what the district court would have done if it had the discretion to give a more lenient sentence, because it already had such discretion. Assuming, *arguendo*, a presumption of prejudice, it is rebutted by the record.

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[2] This distinguishes the allocution cases upon which the court relies. Op. at 525-26. The court noted that some circuit courts have held that prejudice can be presumed in plain error review when the defendant was not offered the opportunity to present mitigating circumstances. In such cases, it is indeed true that the district court was never presented with potential mitigating circumstances that may have affected the sentence. Here, however, counsel had every reason to present every possible mitigating circumstance and *Booker*, while it has expanded sentencing discretion, has not expanded the range of possible considerations when determining a sentence.

III

Finally, it is significant that this case does not involve a Sixth Amendment violation. Unlike *Booker* itself, and *United States v. Hughes*, 396 F.3d 374, 380, 2005 WL 147059, at *5 n. 6 (4th Cir. Jan. 24, 2005) (stating that it is remanding based only on error due to a Sixth Amendment violation and noting that "[t]his case does not present the question of whether a defendant suffers prejudice because a sentencing court fails to treat the guidelines as advisory in determining the sentence"), upon which the court relies, sentencing in this case was not based on judicial fact-finding. The only factors that determined Barnett's Guideline range were the jury conviction itself and prior felony convictions. Thus, unlike *Booker*, the determination of the range was not a constitutional violation. As the court correctly stated, it is well settled that the Sixth Amendment does not require that prior convictions be found by a jury. Op. at 524-25 (citing *United States v. Campbell*, 270 F.3d 702, 707-09 (8th Cir.2001)); *accord Booker*, —— U.S. at ——, 125 S. Ct. at 756 ("Any fact (*other than a prior conviction*) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.") (emphasis added). This is highly significant, because only when a sentence is based on judicial fact-finding—as in *Booker* and *Hughes*—may the sentence be said to have resulted from Sixth Amendment error.

IV

The efficiency argument made in the concurrence by Judge Gwin, while intriguing, suffers from two defects. First, lowering the threshold for showing prejudice

based on "efficiency considerations" is novel and has no basis in the Supreme Court's instructions with respect to remedy. *Booker*, —— U.S. at ——, 125 S. Ct. at 769 (cases on direct review should be reviewed using "ordinary prudential doctrines" and applying the "plain-error test," and "not every appeal will lead to a new sentencing hearing"). Judge Gwin seems to be arguing that judicial economy warrants a blanket remand of all pre-*Booker* sentences on direct review. If the Court's directions are to be followed, we cannot simply conclude that the prejudice inquiry is waived in the interests of judicial economy.

Second, a remand in this particular case would not be resource efficient. While the district court is likely to be somewhat familiar with the case already, after more than a year it will be necessary to review the case before resentencing. We must also consider the need for the parties to submit arguments and to participate in the resentencing, however streamlined. Finally, after sentencing there will be the inevitable appeal to this court. Both district and circuit courts must expend non-trivial effort to resolve even the easy cases, where the outcome is never in doubt. And we must not forget the energy the parties must expend to make their arguments before us.

While I would not necessarily dismiss efficiency considerations altogether, I conclude that in this case judicial economy is best served by affirming. However streamlined, a remand proceeding clearly expends some judicial resources (and the resources of the parties). If we are sufficiently certain that the district court would not alter its sentence, than no efficiency purpose is served by remand. Here, I think we can be quite certain the district court would not alter its sentence.

Armed with all the facts and having heard the parties fully, the district court chose not to reduce the sentence by up to 30 months. I see not one iota of evidence suggesting that the court would be persuaded to reduce the sentence simply because it had more discretion, when it left unused the discretion it already possessed. These facts can be ascertained quickly and easily by a reviewing court. There may be other cases where judicial economy tips the scales in favor of remand rather than further analysis—such as when the defendant is sentenced at the bottom of the Guideline range—but this is not such a case.

I also note that the efficiency point is in tension with the court's argument that remand will allow the district court to consider additional mitigating circumstances. Op. at 526-28. If the resentencing is to be highly efficient, permitting only "limited input from the defendant" and relying upon evidence already presented, then there is little or nothing new for the district court to consider. But if there are any additional mitigating circumstances, than the resentencing will be more cumbersome than the lean procedure envisioned in support of Judge Gwin's efficiency argument. It is difficult to see how resentencing by the district court can be both highly streamlined and give full consideration to additional mitigating circumstances.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-5252

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

YERVIN K. BARNETT, DEFENDANT-APPELLANT

Mar. 9, 2005

ORDER

Before: BOGGS, Chief Judge; MARTIN, Circuit Judge; and GWIN, District Judge. [*]

Pursuant to Sixth Circuit I.O.P. 35(c), less than a majority of the Judges of this Court in regular active service having voted to grant the request of a member of the Court for rehearing of this case en banc, the request for rehearing has been referred to the original panel.

The panel concludes that the issues raised in the request were fully considered upon the original submission and decision of the case. Accordingly, rehearing is denied.

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[*] The Honorable James Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

The appellee's motion for an extension of time to file a petitioner for rehearing en banc is denied.